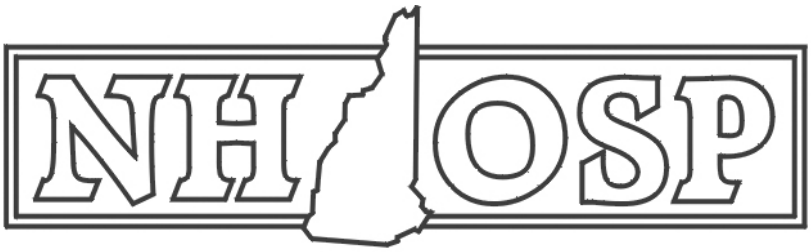
NEW HAMPSHIRE

COURT DECISIONS AFFECTING

ZONING & LAND USE REGULATIONS

June 1994



New Hampshire Office of State Planning

TABLE OF CONTENTS

INTRODUCTION

Since the enactment in 1925 of state statutes allowing New Hampshire municipalities to adopt land use regulations, these local ordinances have been subject to interpretation through the state's judicial system. Decisions handed down by the New Hampshire Supreme Court have influenced changes in the state laws and served to modify amendments to local regulations.

This document contains summaries of some of the major court decisions that have shaped the course of municipal planning and zoning over the past sixty years. The summaries are divided into major topics such as zoning, subdivision and site plan review, general police powers, municipal roads, and state emption of local powers. The content, while not all inclusive, is representative of the major decisions over this time period.

The initial research and preparation was accomplished by Brian R. Barrington, Esq. in 1985. Revisions and additions were completed in 1988 by Marcia O. Keller, with word processing assistance from Denise Adjutant. Report updated through December 1989. Updated and revised by Susan D. Bielski, Esq. in 1993, with word processing assistance from John A. Blackwell. Special appreciation to Steve Allen, Computer Programmer, for assistance with the electronic typesetting of this document.

1 ZONING

1.1 Zoning - Procedures

1.1.1 ***Grounds for appeal must be stated in a motion for rehearing to meet the statutory requirement that a rehearing be requested before appeal to superior court may be granted. A verbatim stenographic record of a ZBA hearing is not required by statute nor commonly made.***

DiPietro v. **Nashua**, 109 NH 174 (1968

No summary.

1.1.2 ***A town meeting moderator may not purport to clear irregularities of a vote which did not produce a two-thirds majority required to pass a new zoning ordinance.***

Alton Drown v. **Hudson**, 112 NH 386 (1972

No summary.

1.1.3 ***The public notice for zoning amendments may refer to a map not contained in the announcement if the map can be publicly viewed.***

Carbonneau v. **Exeter**, 119 NH 259 (1979)

See summary at 1.4.3 Hardship for Variance.

1.1.4 ***A zoning map is not a requisite to a comprehensive plan.***
A continued public hearing on a proposed zoning ordinance does not have to be publicized under the notice provisions of RSA 91-A:2 (Right-to-Know Law)
A comprehensive system of administering a zoning ordinance in lieu of a master plan while the plan is being prepared is sufficient for substantial compliance with the enabling statute.

Nottingham v. Harvey & Lee Homes, 120 NH 889 (1980)

No summary.

1.1.5 ***Notice of a proposed zoning change must be sufficient to inform the public of the scope of the zoning regulation under consideration.***

Bedford Residents Group v. **Bedford**, 130 NH 632 (1988)

The Bedford Planning Board received a petition to rezone a parcel of land. The petition and a portion of the tax map showing the proposed change was available at the selectmen's office. The legal notice, posted in two public places and published in two newspapers, gave the date of a public hearing for the purpose of considering " . . . proposed amendments to the zoning ordinance and zoning map as submitted by the Planning Board and as submitted by petitions of the voters." The planning board voted to approve the petition article, which was included on the warrant, posted at the polls, and approved by the voters. Abutters, some of whose property is in Manchester, claimed they did not have actual notice of the change until they received notice of a site plan review hearing. Superior court concluded that the legal notice was in accord with the requirements of RSA 675:7, but reversed its rulings on a motion for reconsideration. The Supreme Court agreed that the notice " . . . did not contain enough essential information about the scope of the proposed changes to alert interested parties that such changes were under consideration."

1.1.6 ***A direct challenge to the validity of zoning amendments by declaratory judgment petition may be permissible under the declaratory judgment statute even if the zoning appeal statute is not complied with, where the issue on appeal involves a question of law rather than a question of the exercise of administrative discretion.***

Blue Jay Realty Trust v. City of **Franklin**, 132 NH 502 (1989)

No summary.

1.1.7 ***The ZBA cannot, as a matter of law, waive its own procedural deadlines. "Compliance with the procedural deadline for filing an appeal is a necessary prerequisite to establishing jurisdiction in the appellate body." That is, an appeal filed one day after the deadline was invalid and should not have been heard.***

Daniel's Restaurant v. B&J Realty and **Henniker** ZBA, 134 NH 174 (1991)

No summary.

1.1.8 ***A mobile home park is considered a commercial use requiring a special exception. Although a ZBA has authority to grant special exceptions under RSA 674:33, IV, it cannot waive the requirement that one be obtained.***

Mudge v. Precinct of Haverhill Corners, 133 NH 881 (1991)

See summary at 2.7.6.

1.1.9 ***Trial court will not decide a constitutional issue if the case may be disposed of on other, nonconstitutional grounds. A statutory presumption exists that a ZBA's findings are lawful and reasonable on their face, and they may be set aside only when a court is persuaded, by the balance of the probabilities on the evidence before it, that an order or decision by the ZBA is unlawful or unreasonable.***

Korpi v. **Peterborough**, 135 NH 37 (1991)

Korpi owned an auto dealership and constructed a parking lot on the property, which bordered on the Contoocook River. After discovering that the parking lot encroached upon a conservation zone, Korpi sought to maintain the lot by special exception. The Peterborough ZBA, relying on "aesthetic considerations," denied the request for a special exception, and ordered removal of the encroaching portion of the parking lot. The superior court ruled that the special exception provision of the conservation zone provision of the Peterborough ordinance was unconstitutional because it failed to provide "sufficient objective standards" for the exercise of authority by the Board. The court alternatively held the Board's decision unreasonable, and vacated it.

The Supreme Court ruled that the superior court should not have addressed the constitutionality of the ordinance, since the case could be resolved on nonconstitutional grounds. Because the Town of Peterborough failed to provide the Court with a transcript of the trial so that it could review the evidence pertaining to the reasonableness of the ZBA's decision, the Court had to assume that the evidence supported the trial court's findings. Thus the Court affirmed the lower court's ruling that the ZBA's decision was unreasonable, but vacated the ruling of unconstitutionality.

1.1.10 ***Where plaintiffs on appeal from rezoning decision argued merely that city councilors prejudged the rezoning amendment and not that they had any conflict of interest that might have disqualified them from voting, there was no error in trial court's rejection of challenge on those grounds.***

Dennis Quinlan v. City of **Dover**, 136 NH 226 (1992)

City of Dover experienced unprecedented, rapid-paced and overwhelmingly residential development in the mid-80's. In response, a comprehensive revision to the city's master plan, establishing a city goal of creating more commercial and industrial zones, was prepared and adopted by the planning board in 1988. The Board proposed to rezone 90 acres, including Quinlan's property, from residential to commercial, and the amendment was adopted by the city council in 1990. Superior court upheld city council's action and Quinlan appealed.

Quinlan contended that the amendment was invalid because the Board had not made a report and recommendations to the Council as required by the City Code prior to the adoption of the amendment. The Supreme Court noted that the Code only required such

a report when the amendment originated from the Council or from petition by interested parties and not when the proposal originated from the Board, as here, since to require otherwise would be redundant. Quinlan claimed that the Council should not have relied solely on the revised master plan to support the rezoning decision. The Court responded that the master plan serves as the planning board's recommendations to the Council, and that as the proper public hearings had been held, there was nothing invalid in the amendment.

Finally, Quinlan argued that prejudgment by members of the Council rendered its vote voidable. The Court said that enacting zoning amendments is basically a legislative function. A vote by a prejudiced council member is only voidable if there is a conflict of interest, which determined that member's vote beforehand. As no evidence of conflict of interest was introduced, the vote was upheld.

1.1.11 ***A petition for declaratory judgment becomes moot when any event occurs after the petition is filed which terminates the adverse claim.***

Real Estate Planners Inc. v. **Newmarket**, 134 NH 696 (1991)

Real Estate Planners (REP) filed an action to have the court declare that the Town of Newmarket was wrong when it decided that REP's protest petitions against proposed zoning amendments did not comply with statutory requirements (RSA 675:5) and therefore did not operate to require a two-thirds majority vote to pass the amendments. The amendments had passed with a simple majority vote, and REP wanted them declared invalid. REP also asked the court to allow it to amend its petition to request that the court allow those who had signed the protest petitions to proceed as though they had vested rights in their proposed developments. The trial court denied the motion to amend and also dismissed the declaratory action as being moot, since the town had re-passed the same amendments at a later time and REP had not protested then.

The Supreme Court affirmed the superior court's ruling. It noted that neither REP nor signatories of the protest petitions had taken steps to ensure that their rights under the existing ordinance would be vested, such as obtaining a building permit, subdivision approval, or planning board approval of any plan, and the trial court was within its discretion to deny the motion to amend, thereby refraining from speculation that such steps would have been taken had the amendments not passed the first time. The fact that REP failed to protest at the later passage of the amendments rendered its declaratory judgment action moot, as there was no longer a valid controversy.

1.2 Zoning - Hearing/Appeal

1.2.1 ***Landowner cannot bring a separate lawsuit claiming an unconstitutional taking of property after losing a previous lawsuit appealing denial of a variance on the same issue.***

Shepherd v. **Westmoreland**, 130 NH 542 (1988)

The Zoning board of Adjustment declined to accept an application for a variance because it was identical to a request that had been denied several years earlier. Plaintiff did not appeal the ruling, but later filed a petition in court alleging that the variance denial and the zoning ordinance as applied to her amounted to an inverse condemnation. The Court ruled that attaching a new label to her claim is not sufficient reason to overturn the earlier ruling against her. The board could accept a subsequent application for a different proposal or following a change in the ordinance.

1.2.2 ***Findings of a Zoning Board of Adjustment, upon all questions of fact properly before it, are deemed to be facially lawful and reasonable, and will be upheld on appeal if there is evidence upon which they could reasonably be based. In an appeal from a ZBA, it is within the discretion of the trial judge whether to admit additional evidence beyond the certified record of the ZBA.***

Peter Christian's v. Merrimack, 132 NH 677 (1990)

No summary.

1.2.3 ***Compliance with a procedural deadline is a necessary prerequisite to establishing jurisdiction in the appellate body. The Dermodys filed their appeal of the planning board's approval of an abutting site plan one day late. The Supreme Court stated that the superior court had no discretion to waive the filing time requirement for an appeal, as it is statutory, and New Hampshire requires strict compliance with statutory requirements.***

Michael and Kathleen Dermody v Town of **Gilford** Planning Board, 137 NH 294 (1993)

No summary.

1.3 Zoning - Variance - Frontage

1.3.1 ***When a restriction such as a frontage requirement as applied to a particular piece of land, is unnecessary to accomplish a legitimate public purpose, or the gain to the public is slight while the harm to the citizen and his property is great, the exercise of police power becomes arbitrary and unreasonable, and thus unenforceable.***

Metzger v. Town of **Brentwood**, 117 NH 497 (1977)

Brentwood, as part of a scheme to use gates and bars on roads not fit for travel, closed part of Haig Road to relieve present residents from the public expense of improving and maintaining roads which may be needed by new development. After the closing, the

plaintiff could no longer meet the frontage requirement that called for 200 feet with no qualifications for lot dimensions. The town had an interest in emergency vehicle access, but there was found to be no substantial relationship between this need and the 200 foot frontage requirement. The court held that the ordinance on frontage was unconstitutional in this situation.

1.4 Zoning - Variance - Hardship

1.4.1 ***Unnecessary hardship must arise not from personal circumstances of the owner, but from some unique condition of the parcel of land distinguishing it from others in the area and barring any reasonable use of the land consistent with literal enforcement of the zoning ordinance.***

Margate Motel v. Town of **Gilford**, 130 NH 91 (1987)

The Gilford ZBA granted a variance from setback requirements to the Bluebird Motel. The Motel owners planned to raze existing, outdated cottages and construct a two-story motel. An abutter, Margate Motel, appealed the grant to superior court, which affirmed the town's actions. The decision was reversed on appeal to the Supreme Court, which found that the evidence presented did not support a finding of unnecessary hardship. The finding of hardship was based only on the personal and financial condition of the owners, not on the uniqueness of the parcel. The Gilford Ordinance listed 25 uses for the property that the defendants could consider. To support a variance, it must be shown:

1) no diminution in value of surrounding property would be suffered;
2) granting of the variance would benefit the public interest;
3) denial of the variance would result in unnecessary hardship to the landowner seeking it;
4) granting the permit would do substantial justice; and
5) the use must not be contrary to the spirit of the ordinance.

1.4.2 ***A triangular downtown parcel in a district of substantial commercial uses, with a residential classification but little value for residential units, may have unique characteristics constituting a hardship such that a variance from strict compliance with residential district use could be granted.***

Levesque v. Town of **Hudson**, 106 NH 470 (1965)

No summary.

1.4.3 ***A superior court master has no authority to reverse a ZBA's denial of a variance where the factual basis indicated only financial hardship exists. Loss of profits by itself never warrants the granting of a variance based on hardship.***

Vannah v. Town of **Bedford**, 111 NH 105 (1971)

No summary.

See also Richardson v. **Salisbury**, 123 NH (1983)

1.4.4 ***A variance may not be based on financial hardship or because a preexisting nonconforming use cannot be changed to another nonconforming use. A neighborhood with one other commercial use and the rest residential may reasonably be classified as residential. The public notice for zoning amendments may reference a map not attached to the notice.***

Carbonneau v. **Exeter**, 119 NH 259 (1979)

No summary.

1.4.5 ***A desire to obtain a greater return on an investment in rental apartments is insufficient as a matter of law to constitute a hardship to obtain a variance.***

Rowe v. **Salem**, 119 NH 505 (1979)

No summary.

1.4.6 ***Neither nonconforming commercial use of property nor economic hardship to the owner are due to special conditions unique to a particular parcel of land.***

Associated Home Utilities v. **Bedford**, 120 NH 812 (1980)

No summary.

1.4.7 ***Concern for growth of medical practice is personal economic hardship, which is not the requisite type of hardship caused by uniqueness of the land.***

Moore v. **Rochester**, 121 NH 100 (1981)

No summary.

1.4.8 ***Security problems of a commercially zoned property due to its remote location may constitute hardship to support granting of a variance to build a residential building in order to increase police protection, as the location is a unique characteristic of the parcel.***

U-Haul of NH and VT Inc. v. **Concord**, 122 NH 910 (1982)

No summary.

1.4.9 ***Illness of landowner cannot be a basis for finding of hardship.***

Ryan v. Manchester, 123 NH 170 (1983)

No summary.

1.4.10 ***If the land is reasonably suited for a permitted use, no hardship can be found and no variance can be granted, even if the other four parts of the five-part test for the granting of a variance have been met. (See Margate Motel v. Gilford, 130 NH 91 (1987).***

Governor's Island Club v. **Gilford**, 124 NH 126 (1983)

Governor's Island Club appealed grant of a variance by the ZBA that allowed subdivision of one shore front lot into two, each of which would contain less than the required area. The owner had an additional parcel of land separated from the shore front lot by a road. Each of the newly created lots would include a piece of the back lot and the remaining back land would be retained as open space. The Court ruled the land failed to meet the test for hardship since the shore lot was entirely suitable as a residential lot.

Crossley v. Town of **Pelham**, 133 NH 215 (1990)

Landowners went before the Pelham ZBA for a variance to replace the one-car garage on their nonconforming lot with a larger two-car garage. Neighbors appealed the granting of the variance to the Superior Court, claiming that the requisite unnecessary hardship did not exist in this case, where the landowners simply wanted a larger garage. The Superior Court found hardship, but was overturned on appeal to the Supreme Court. The Court noted that the hardship cited was a result of the landowners' personal circumstances, that a one-car garage or even no garage would still be a reasonable use consistent with the ordinance, and that therefore the superior court erred as a matter of law in finding unnecessary hardship supporting the grant of a variance.

1.4.11 ***A zoning board's decision is subject to limited judicial review, and the appealing party must satisfy the statutory burden of proof to show that the decision is unlawful or unreasonable.***

Labrecque v. **Salem**, 128 NH 455 (1986)

No summary.

1.4.12 ***A municipality's failure to enforce an ordinance does not constitute ratification of a policy of nonenforcement and will not preclude a municipality's subsequent enforcement of the ordinance.***

Alexander v. **Hampstead**, 129 NH 278 (1987)

In violation of the Hampstead zoning ordinance, the plaintiff built the shell of a second story and a new roof on his home. After the town ordered him to halt construction and denied him permission to occupy the second floor, he applied for a variance. The Superior Court upheld denial of the variance and required the town's ordinance to be enforced by ordering the plaintiff to remove the nonconforming addition. The Supreme Court found little justice on either side, but upheld the Superior Court.

1.4.13 ***Condition of subdivision approval that further subdivision was contingent on town acceptance of privately built access road cannot be used as hardship to support the granting of a variance if town did not accept road.***

Goslin v. **Farmington**, 132 NH 48 (1989)

No summary.

1.4.14 ***Where marina had been operating for several years as a viable commercial entity before requesting variance to expand, owner was clearly making reasonable use of his property and thus hardship justifying variance did not exist.***

Grey Rocks Land Trust v Town of **Hebron**, 136 NH 239 (1992)

Decision of ZBA granting a variance to a nonconforming marina for construction of additional boat storage facility was reversed. In order to validly grant a variance, a ZBA must make specific factual findings showing, among other things, that the deprivation resulting from a denial of a variance is so great as to deprive the owner of ANY reasonable use of his land, and that the hardship is the result of some unique condition of the land and not the personal circumstances of the owner. The party seeking the variance has the burden of producing evidence sufficient for the Board to establish these requirements.

A nonconforming use may not form the basis for a finding of uniqueness to satisfy the hardship test, as the fact that the use is nonconforming has nothing to do with the land itself. Additionally, the proposed expansion of the marina would have a substantially different impact upon the neighborhood's scenic, recreational and environmental values in contravention of the purpose of the zoning ordinance, and thus would be beyond the scope of "natural expansion" allowed by law. Therefore the ZBA's grant of a variance was invalid.

1.5 Zoning - Variance - Review

1.5.1 ***Where superior court order provided that "further argument will be scheduled on request" and court later denied the opportunity for plaintiff to present evidence before denying the appeal, the court abused its discretion and was reversed on appeal, where plaintiff reasonably relied on the order and in fact requested an evidentiary hearing.***

Estabrook v. **Jefferson**, 134 NH 367 (1991)

No summary.

1.6 Zoning - Conditional Variance

1.6.1 ***A variance must relate to the land and not the landowner, thus an annual renewal requirement is unreasonable and void.***

Vlahos Realty v. **Little Boar's Head District**, 101 NH 40 (1958)

The court reviewed the validity of a conditional variance for an ice cream business that was allowed to continue as a nonconforming use in 1947 after a two-year abandonment of the business during World War II. The test of validity of conditions on a variance are whether they are lawful, necessary in order to observe the spirit of the zoning ordinance, and not plainly unreasonable. A condition requiring an annual permit which is nontransferable is an invalid restriction because zoning conditions are designed to regulate the use of the land and not the person who owns or operates the premises. Conditions for neatness and limiting the use to one type of retail sale are reasonable for a variance.

1.7 Zoning - Grandfather Clause

1.7.1 ***A grandfather clause which explicitly refers only to plots recorded before 1964, but which was consistently applied by the building inspector to any subdivision recorded before passage of stricter minimum lot sizes, will be interpreted according to past practice.***

Win-Tasch Corp. v. **Merrimack**, 120 NH 6 (1980)

A plan for a subdivision was recorded in 1966. Two subsequent zoning amendments increased the minimum lot requirements. The recorded subdivision was conveyed to Win-Tasch Corp., who continued to build and was granted additional permits for substandard lots. Building inspector then informed owner that new lot size would be applied. The grandfather clause for recorded subdivisions was never amended with the subsequent zoning amendments and read that it only applied to lots recorded before 1964. However, the previous building inspector had consistently interpreted and administered

the grandfather clause to protect lots of any subdivision plans recorded prior to passage of the zoning amendments. The Court applied a rule of statutory construction, which states that a long-standing, practical and plausible interpretation of a given ordinance of ambiguous meaning by those responsible for its implementation is evidence of the legislative intent. Thus, the saving clause, by past interpretation, meant to include any prior recorded subdivision.

See also summary at 7.3.1. Municipal Liability: Quasi-Judicial Acts.

1.7.2 ***Denial of a building permit for lack of frontage was improper where an applicable grandfather clause protecting prior recorded lots from dimensional requirements did not explicitly except frontage requirements from being grandfathered.***

Fifield Island, Inc. v. **Hampton**, 124 NH 828 (1984)

No summary.

1.8 Zoning - Vested Rights

1.8.1 ***Developer took a calculated risk that the proposed amendment prohibiting his project would not be passed, therefore he could not have proceeded in good faith to rely on the existing ordinance.***

Piper v. **Meredith**, 110 NH 291 (1970)

A vested right arises when an owner, relying in good faith on the absence of any regulation which would prohibit his proposed project, has made substantial construction on the property or has incurred substantial liabilities relating directly thereto, or both. With a vested right, the project may be completed in spite of the subsequent adoption of an ordinance prohibiting the same. The acquisition price is excluded from calculation of the amount spent to change the use of the land in a tangible way. Actual notice of a proposed amendment precludes a claim for vested rights based on a good faith reliance on the lack of an ordinance prohibiting the project.

1.8.2 ***A property owner has no vested right in the continuing existence of any particular zoning classification of his or her property.***

Navin v. **Exeter**, 115 NH 248 (1975)

No summary.

1.8.3 ***Town could not require plaintiff, under its zoning ordinance, to remove a sign and substitute a much smaller sign without compensation where property owner had a vested right in maintaining sign as a preexisting nonconforming use.***

L. Grossman Inc. v. **Gilford**, 118 NH 480 (1978)

No summary.

1.8.4 ***A town may not bargain away the zoning authority delegated to the planning board by statute in settling an appeal of a denial of a variance. A city attorney may not enter into settlements that have the effect of zoning. Vested rights do not accrue until substantial construction costs occur, despite the issuance of a variance.***

PMC Realty and Nalbanian v. **Derry**, 125 NH 126 (1984)

No summary.

1.8.5 ***Vested rights to complete a manufactured housing park did not accrue because defendant neither acted in good faith nor incurred substantial liabilities.***

Plaistow v. Nadeau, 126 NH 439 (1985)

Defendant entered into a purchase and sale agreement for 95 acres of land located in an area that was partially a commercial zone, but predominantly residential. The agreement was contingent on receiving approvals from the town for development of a manufactured housing park. On the advice of the Plaistow building inspector, the defendant discussed his proposal with the planning board in an informal session. He was informed that a formal application would not be approved because of the zone and that a manufactured housing ordinance was being prepared for presentation to the town. Defendant proceeded to clear and survey the land. The town passed an ordinance permitting manufactured housing only on individually owned lots. Defendant was formally notified that his project was illegal under the new ordinance, but continued to complete eight housing sites and sold some units. The Town obtained a permanent injunction, restraining defendant from continuing the project without obtaining the required approvals. The Supreme Court upheld the master's ruling that the defendant "at all times" acted in bad faith because he had no reasonable basis for believing that his plan was legal and thus did not acquire vested rights. The Court also rejected defendant's contention that the town failed to comply with RSA 31:119 (now RSA 674:32) because it does not provide a suitable area in town for a manufactured housing park. The Plaistow ordinance clearly provides for placement of manufactured housing on individual lots and for subdivisions created exclusively for manufactured housing in compliance with the requirements of state law.

See also Riverview Park v. **Hinsdale**, 113 NH 693 (1973)

1.9 Zoning - Nonconforming Use

1.9.1 *Nonconforming uses are protected both by statute and by the New Hampshire Constitution.*

Hampton v. Brust, 122 NH 463 (1982)

Defendant owned commercial property that was divided into three units, one of which contained coin-operated amusement machines. He installed additional machines in a second area. The building inspector found this to be a violation of the zoning ordinance and the board of adjustment denied a request for a variance. Superior court agreed with the town, but on appeal, the Supreme Court found the use to be permissible because the defendants did not substantially change the nature and purpose of their original use. The Court also found that the ordinance, as written, did not prohibit defendants " . . . developing their nonconforming use in a way that results in a mere intensification of the use that reflects a natural expansion and growth of trade."

A second issue dealt with language added to a zoning amendment by the planning board after the second hearing. The Court found that amendment was not validly enacted because the voters were not given an opportunity, at a third hearing, to discuss the ordinance as it appeared on the ballot.

1.9.2 *A town may force an amortization plan on a nonconforming junk-yard which is a nuisance and safety hazard in a residential zone.*

Lachappelle v. **Goffstown**, 107 NH 485 (1967)

Lachapelle operated a junkyard and did not fence in his lot within one year of a new zoning ordinance that made his use nonconforming. The issue on appeal was whether a town may force a nonconforming use to amortize until a predetermined terminal point. The Court held that towns in this State have considerable flexibility in dealing with the problems of junkyards that pose safety hazards by housing vermin, attracting children to a dangerous place, and blighting neighborhoods. Thus, generally, reasonable attempts to discourage the continuation of nonconforming uses, in the process of furthering an important public need without confiscatory damage to the landowner, are allowed in New Hampshire. For junkyards, the public benefit of termination outweighs the private injury, if the time allowed is reasonable.

1.9.3 *A town may not penalize the owner of a nonconforming use by denying alterations valid under present zoning.*

Seabrook v. D'Agata, 116 NH 72 (1976)

Defendants owned a dwelling that did not conform with the zoning ordinance in three respects: the lot was too small, the side yards were too small, and it contained three family units in an area zoned for one- and two-family residences. By enclosing a

previously open carport, they constructed an addition to their dwelling consisting of a storage room, a use permitted by the town zoning ordinance. The town contended, however, that a nonconforming owner may not make alterations to his nonconforming use.

The court did not agree that the carport constituted an expansion of a nonconforming use. It interpreted that phrase to indicate an expansion of the nonconforming features of the dwelling, rather than an addition which entirely conforms to the zoning ordinance and which is, in fact, commonly found in the neighborhood. The town may not interpret a use in such a way as to unlawfully reduce the original vested interest acquired by the owners. To deny the property owners the right to build, within the confines of zoning, a structure identical to many of their conforming neighbors was, in effect, to penalize them for the nonconforming nature of their property.

1.9.4 ***Property owners are entitled to nonconforming use status only for a use in fact existing on the land at the time of the adoption of a new zoning ordinance.***

Wunderlich v. **Webster**, 117 NH 283 (1977)

No summary.

1.9.5 ***A denial of a variance to expand a nonconforming use was unreasonable when the area had gone through a substantial change in character inconsistent with the district designated by the zoning ordinance.***

Belanger v. City of **Nashua**, 121 NH 389 (1981)

The plaintiff operated a realty office as a nonconforming use grandfathered from the zoning ordinance. She was denied a variance to extend the nonconforming use throughout the two-story house on the grounds that the spirit of the ordinance would be violated. The trial court found the denial unreasonable, finding that the city had not confronted the current character of the neighborhood, and that the zoning ordinance and comprehensive plan did not consider the substantial changes in the district from the time it was originally zoned for single family residential use. The Supreme Court noted that the general policy of zoning is to carefully limit the extension and enlargement of nonconforming uses, but upheld the trial court since Ms. Belanger had submitted evidence supporting the trial court's findings.

1.9.6 ***Alterations to a structure are permitted as long as the use is not substantially different from the use before the alteration.***

Hampstead v. Capano, 122 NH 144 (1982)

The defendant constructed front steps and a sun deck that did not meet the setback requirements without a variance, and the Town sued. Superior Court issued an order requiring removal of the steps and deck. The Supreme Court agreed with the defendant that the addition of front steps was a permissible alteration providing access to the house, but said that the elaborate entrance and sun deck was a substantially different use which must be removed unless a variance was granted.

1.9.7 ***Enlargement or expansion of a nonconforming use may not be substantial and may not render the property proportionally less adequate.***

New London Land Use Assoc. v. **New London**, 130 NH 510 (1988)

Lakeside Lodge consists of 17 housekeeping units on a 17-acre parcel in a residential district that requires two acres per dwelling unit. Since the Lodge was in operation before the zoning ordinance was enacted, the nonconforming use on less than the required acreage was allowed to continue. The Board of Adjustment granted the owners a special exception to allow a planned unit development. The existing buildings would be razed and replaced with 17 condominium units and a clubhouse building. Although the number of dwelling units would remain the same, the living, storage and common space would more than double.

On appeal of the abutter, Land Use Association, the Supreme Court overruled the lower court's decision that upheld the granting of the special exception. The Court stated that the nonconforming use was related to the commercial operation in a residential district. The Court agreed with the Association that the nonconforming density cannot be used to satisfy density standards required for a special exception. In its decision, the Court said, "Nonconforming uses may be expanded, where the expansion is a natural activity, closely related to the use at the time of enactment of the ordinance creating the nonconforming use. However, enlargement or expansion may not be substantial and may not render premises or property proportionally less adequate."

1.9.8 ***In order to be allowable as a "natural expansion," expansion of a nonconforming use must not be such as to constitute an entirely new use. Factors to be considered are the nature and purpose of the prevailing nonconforming use, the nature and kind of the proposed change in use, and whether the change in use will have a substantially different effect on the neighborhood.***

Devaney v. **Windham**, 132 NH 302 (1989)

plaintiff owned a cottage on a lot that did not meet the setback requirements of the zoning ordinance at the time of purchase. When he began to remodel the camp without a building permit, the town issued a cease and desist order. He continued to add on to the camp, including a second story on the building, a two-story addition, and an unapproved septic system. A requested variance was denied, a further cease and desist order issued,

but the work continued. Superior court granted the Town's request for an injunction that required the plaintiff to return the building to dimensions complying with the zoning ordinance.

On appeal, the Supreme Court affirmed the injunction. The Court stated that while a "natural expansion" of a nonconforming use may be allowed, the expansion in this case was substantial enough to constitute a new use and could not be permitted. The Court cited the principle that setback requirements are designed to prevent overcrowding on substandard lots. This expansion violated that principle and served to block an abutter's view of the water and sunsets and decreased the amount of sunlight coming into her house.

(See also Stevens v. Town of Rye, 122 NH 688 (1982); New London v. Leskiewicz, 110 H 462 (1970)

1.9.9 ***Because nonconforming uses violate the spirit of zoning laws, any enlargement or extension must be carefully limited to promote the purpose of reducing them to conformity as quickly as possible. The expansion of a nonconforming one-story office building to a four-story office/parking complex would alter the purpose, change the use, and affect the neighborhood in such a way as to render the requirement of a variance valid.***

Granite State Minerals v. **Portsmouth**, 134 NH 408 (1991)

No summary.

1.9.10 ***A change from tenant occupancy to owner occupancy is not necessarily an extension of a nonconforming use, if it does not affect the use of the land. Planning Board therefore had no authority to deny application for conversion from apartment building to condominium. "No condominium may be treated differently by any zoning or other land use ordinance which would permit a physically identical project or development under a different form of ownership." RSA 356-B:5.***

Cohen v. Town of **Henniker**, 134 NH 425 (1991)

No summary.

1.9.11 ***Repeated issuance of building permits for preexisting substandard lots constituted an existing policy which required a legislative act to be changed; planning board could not simply change its interpretation of the law.***

Tessier v. Town of **Hudson**, 135 NH 384 (1991)

The Town of Hudson ZBA denied Tessier either a building permit or a variance, despite the fact that he had a substandard lot that had been in existence prior to 1942, which he argued was a grandfathered nonconforming lot. Evidence presented in superior court showed that the area surrounding Tessier's campground property had been improved in violation of the Hudson zoning ordinance due to the previous zoning administrator's practice of granting permits to substandard lots in existence prior to 1942. The Supreme Court stated that the Town could not change its de facto policy of permitting building on substandard lots merely by requesting that the new administrator ignore past practices. A zoning ordinance must reflect the character of the neighborhood, and only the voters are authorized to change a zoning policy; therefore the ZBA's decision was unreasonable and invalid.

1.10 Zoning - Permitted Uses

1.10.1 *Unless an ordinance defines otherwise, the term "family" retains its historical and traditional definition.*

Region 10 Client Management, Inc. v. **Hampstead**, 120 NH 885 (1980)

The State Division of Mental Health sought to use a residence in a single-family district as a home for the developmentally impaired. The town responded that the use would be a prohibited multiple-unit development. The superior court master ruled that a group home would constitute a family and therefore was a permitted use. The Supreme Court disagreed. The traditional definition of "family" refers to persons living together related by blood, marriage or adoption. A town is free to define the term more broadly or not. The home was allowed on other grounds. See 7.1.4. Preemption.

1.10.2 *The building inspector had no authority to deny a building permit after a variance was issued and the State WSPCC approved a septic system.*

Marino v. Goss (**Rye**), 120 NH 511 (1980)

Marino was granted a variance to build a residence on an undersized lot. The State Water Supply and Pollution Control Commission approved a septic system as a condition to the variance. The building inspector denied a building permit on the basis that the proposed use was injurious, noxious or offensive to the neighborhood. The court found that an inspector has continuing authority only to ensure that the plaintiff's construction meets the specifications of the approved plans. The inspector is bound by the ZBA finding and may not exercise independent discretion. Because he acted in "good faith" the claim for financial damages was denied.

1.10.3 ***A home occupation will be permitted in a residential district only if it is customarily incidental to the use of the property as a dwelling. Examples of accepted uses are such activities as dressmaking, hairdressing and tutoring. An ordinance must clearly provide what businesses will be permitted as home occupations, or the above common law definition will apply. The operation of a car and repair business and the operation of a realty office are not "home occupations."***

Milford v. Bottazzi, 121 NH 636 (1981); Mary Louise Hancock v. **Concord**, 111 NH 413 (1971)

No summary.

1.10.4 ***The construction of docking, roads, parking lot and picnic grounds for a cruise ship may not be a permitted use in a rural district that permits nonintensive recreational uses. Such use was found to be more intensive than a church, camping park, stable, or recreation camp for children.***

Brennan v. Winnipesaukee Flagship Corp. (**Meredith**), 122 NH 524 (1982)

No summary.

1.10.5 ***The permissive variety of zoning ordinance, in absence of variance or special exception language, functions generally to prohibit uses of land unless they are expressly permitted as primary uses or are found to be accessory to a permitted use.***

Windham v. Alfond, 129 NH 24 (1986)

The defendants purchased a house on six acres of land in the residential district. They applied for a building permit to construct a barn and informed the building inspector that it would be used for horses. The building inspector informed them a variance would be needed. The permit was issued, the barn was built, and the application for a variance was denied. Superior court denied the town's request for an injunction to stop the use as a stable, ruling that keeping horses was lawful as an accessory use. The Supreme Court reversed, stating that an accessory use must be "occasioned by and subordinate to the permitted primary use and customarily or habitually associated with it," and ruled that the evidence presented in this case did not support the finding of an accessory use.

1.10.6 ***An accessory use of a residence, which by definition includes a customary home occupation, may not be injurious or detrimental to the neighborhood.***

Narbonne v. **Rye**, 130 NH 70 (1987)

The town issued a cease and desist order against the plaintiffs, claiming that the manufacturing of stained glass objects in their home was not a customary home occupation. Both superior and Supreme Court agreed with the town that increased traffic, parking problems, large truck deliveries, signs, and advertising all supported a finding of a commercial or business use of the property that had a "deteriorating effect on other residential properties" and thus was prohibited by the zoning ordinance.

1.10.7 ***Marine construction company's heavy equipment repair shop could not lawfully be moved from an industrial zone to a parcel of land zoned "resort commercial", since the use did not fit into the zoning ordinance's "marina" category permitted in the "resort commercial" zone.***

Campbell Marine Construction, Inc. v. Town of **Gilford**, 132 NH 495 (1989)

No Summary.

1.11 Zoning - Special Exception

1.11.1 ***A town may require adequate and appropriate facilities for sewage disposal prior to the granting of a special exception.***

Burke v. **Jaffrey**, 122 NH 510 (1982)

The plaintiff sought a special exception to erect 56 condominium units on a 23.96-acre lot. The ZBA denied the request under guidelines, set by ordinance, which were based on: 1) an appropriate location, 2) no detrimental effect to the neighborhood, 3) adequate and appropriate facilities for the use, 4) no adverse affect on any other district. The board required that adequate on-site septic system with state approval must be planned before the exception would be granted regardless of the estimated expenditure of $15,000 to supply that proof. The court did not find this condition unreasonable.

1.12 Zoning - Slow Growth

1.12.1 ***Ordinance requiring three- and six-acre minimum lots in an isolated rural town may be constitutional.***

Steel Hill v. **Sanbornton**, US Court of Appeals, First District, (1972)

A second home cluster development on Steel Hill would double the population of the town of Sanbornton. The town meeting passed ordinances to create six-acre forest conservation districts and three-acre general residential and agricultural districts. The appeals court responded that the ordinances were not unconstitutional. The court reasoned that, although such large lots would not bear a reasonable and substantial

relation to public health, safety and welfare in a suburban town, they would in an isolated rural town. The three-acre lots in areas of poor drainage could alleviate a health threat from septic systems. The six-acre lots could serve the general public welfare to prevent irreversible effects on the area's ecological balance, substantial burdens on town services, and tides of weekend visitors. However, these districts may only stand as emergency stop-gap measures until professional or scientific study establishes what size lots would reasonably protect rural values and not simply act to keep outsiders away.

1.12.2 ***When a municipality attempts to control population growth through definite and detailed control of land development, regulations must be enacted in accordance with the zoning statute. Municipalities can regulate the timing of development.***

Beck v. **Raymond**, 118 NH 793 (1978)

Town of Raymond's "slow-growth" ordinances were found to be effectively zoning regulations and thus the subdivision plan, which was approved prior to the zoning ordinance, was grandfathered. In dicta, the court discussed growth control ordinances. The power to restrict population density necessarily implies the authority to direct and control population growth, RSA 31:60 (now RSA 674:16). A reasonable time control on population growth must be based on comprehensive planning with a solid scientific, statistical basis. These controls are not by-laws based on the police power for public health and safety, but zoning to control growth through definite and detailed control of land development. A carefully designed community land use plan should be the basis for land use control. Growth controls must be reasonable and nondiscriminatory. Good faith efforts to increase the capacity of municipal services should accompany growth controls. An apparent primary purpose to prevent the entrance of newcomers is not a valid public purpose. The Raymond ordinance was upheld as a temporary emergency measure for two years (now one year by RSA) to develop a master or comprehensive plan. The ideal solution is effective regional or statewide land use planning.

1.12.3 ***A slow growth ordinance may impose reasonable restrictions up to one year without a master plan for community development.***

Conway v. **Stratham**, 120 NH 257 (1980)

No summary.

1.12.4 ***A three percent indefinite limit per year that is not based on comprehensive planning, would prevent development, and is illegal and unenforceable.***

Stoney-Brook Development Corp. v. **Fremont**, 124 NH 583 (1984)

The town of Fremont passed a growth control ordinance based on a "comprehensive plan" which set a three percent growth rate for the issuance of building permits. The

three percent figure was "taken out of a hat" and based on the 1975 growth rate of the town when surrounding towns had a growth rate double that. The Court upheld the superior court in finding that the growth rate was not based on comprehensive planning with a solid scientific, statistical basis. The growth rate did not consider regional development needs. The growth control ordinance was not intended to regulate and control the timing of development, but to prevent development and maintain a small town environment. A growth control ordinance must realistically limit growth in a reasonable, responsible and conscientious manner.

1.12.5 ***When a planning board purports to apply its limited growth recommendations on an ad hoc basis, rather than enacting a growth ordinance, it circumvents the requisite legislative process.***

Rancourt v. **Barnstead**, 129 NH 45 (1986)

The plaintiff applied to the planning board for approval of a proposed subdivision of 24 acres into nine lots, each to be used for one triple-family townhouse unit with a separate water and septic system. The planning board denied the proposal for the following reasons: the impact the subdivision would have on the town's growth rate; its impact on the schools; and "a concern for natural resources." The trial court upheld the board's denial. The Supreme Court vacated and remanded, declaring that a town wishing to limit growth must do so as required by statute through passage by the legislative body of an ordinance. A growth control ordinance must restrict projected growth no more than necessary to allow for orderly development of municipal services.

1.13 Zoning - Spot Zoning

1.13.1 ***Rezoning of a small agricultural district is not spot zoning if based on a compelling reason or public need.***

Schadlick v. **Concord**, 108 NH 319 (1967)

An agricultural zoned district was located next to apartment houses and office buildings in Concord. An ordinance was proposed and passed to reclassify the district to residential. An abutter complained that the act amounted to spot zoning. An area is spot-zoned when it is singled out for treatment different from that of similar surrounding land in a manner that cannot be justified on the basis of health, safety, morals or general welfare of the community and which is not in accordance with a comprehensive plan. The mere fact that an area is small and is zoned at the request of a single owner and is of greater benefit to him than to others does not make a case of spot zoning if there is a public need or a compelling reason for it. Here, there was a need for more apartments, there were apartments close by, and the comprehensive plan designated it as an area for future apartments, and the reclassification was upheld.

1.13.2 ***An area is spot-zoned when it is singled out for treatment different from that of similar surrounding land which cannot be justified on the***

basis of health, safety, morals or general welfare of the community and which is not in accordance with a comprehensive plan.

Munger v. **Exeter**, 128 NH 196 (1986)

The disputed property is a one-half-acre parcel, which was zoned single family residential when the zoning ordinance was adopted in 1973. The property contained both commercial and residential uses and was considered nonconforming. In 1976, Carbonneau (the then owner) applied for a variance to permit more intensive commercial use of the property. The board denied the application. The Superior Court overturned the board, but the Supreme Court reversed on appeal (see summary of Carbonneau v. **Exeter** 119 NH 259 at 1.4.3). Carbonneau then petitioned the town to amend the zoning ordinance to reclassify his property. The property was rezoned commercial by vote at an Exeter town meeting. Plaintiff abutter's motion for rehearing was denied, and he appealed the decision of the town meeting to the superior court, which upheld the rezoning. The Supreme Court reversed superior court's dismissal of the appeal because review of the record showed no public need or compelling action for the rezoning, and it was therefore invalid spot zoning.

1.13.3 ***The rule of accessory use recognizes that an owner may employ land in some ways not expressly permitted or prohibited by ordinance, as long as such uses are subordinate to the principal use, in this case residence.***

Treisman v. **Town of Bedford**, 132 NH 54 (1989)

Amendment to town ordinance allowing the storage and operation of helicopters on 5-acre tracts in residential zones was held not to be invalid spot zoning. The Court reasoned that as the amendment allowed only residents to operate helicopters on their residences and only for noncommercial uses, the amendment defined a proper accessory use.

1.13.4 ***The sole purpose of the master plan is to provide guidance, it does not have the force and effect of law. RSA 674:46-a, IV mandating that all historic districts and regulations must be compatible with master plan was directed at historic district commissions and not to the legislative bodies of towns.***

Portsmouth Advocates v. **City of Portsmouth**, 133 NH 876 (1991)

See summary at 1.14.2. Historic Districts.

1.14 Zoning - Historic Districts

1.14.1 ***It was not reasonable for the Historic District Commission and the ZBA to issue a permit allowing the demolition of a bank in an historic district without sufficient information.***

Hanrahan v. **Portsmouth**, 119 NH 944 (1979)

The Portsmouth Historic District Commission, in a decision confirmed by the ZBA, approved a permit to demolish a bank in the historic district. The local ordinance listed many factors to be considered, which, although not elements that must individually be proven by evidence, must be reviewed by an historic district commission. Personal opinions of the members are insufficient to allow the commission to reach a reasoned decision as required by the statute, RSA 31:78-89 (now RSA 677:6-14). Neither are the assertions of the bank's attorney sufficient evidence. The commission has duty to gather its own facts, including engagement of technical consultants. The case was remanded to the commission to reach a reasoned decision.

1.14.2 ***The sole purpose of the master plan is to provide guidance, it does not have the force and effect of law. RSA 674:46-a, IV mandating that all historic districts and regulations must be compatible with master plan was directed at historic district commissions and not to the legislative bodies of towns.***

Portsmouth Advocates v. **City of Portsmouth**, 133 NH 876 (1991)

The Portsmouth City Council voted to remove several buildings from the city's historic district, at the request of one of the owners. A citizen's group challenged the council's action as violative of the City's master plan. The Supreme Court ruled that the statutory mandate that historic districts and regulations be compatible with the master plan only binds the historic district commission to the plan, and not the municipality's legislative body. The master plan serves only as guidance to the development of planning proposals, it does not have the force and effect of law.

The Court also stated that as long as the boundary change was consistent with some "comprehensive planning purpose," which the master plan may or may not reflect, it would not be considered as invalid spot zoning, even though the change was made at the request of one landowner. The buildings taken out of the district had been found by the Commission to have no significant historic value, and thus the Court held that their removal was not unreasonable. Therefore the Council's redrawing of the boundaries of the historic district was upheld as valid.

1.15 Zoning - Exclusionary Zoning

1.15.1 ***A municipality's power to zone property to promote the health, safety and general welfare of the community is delegated to it by the state,***

and the municipality must, therefore, exercise this power in conformance with the enabling legislation. "Community" encompasses the public of an entire region, not only the residents of a town. Zoning ordinances which do not provide realistic opportunities for affordable housing (for low- and moderate-income families) are prohibited in the State of New Hampshire.

Britton v. **Town of Chester**, 134 NH 434 (1991)

The Chester zoning ordinance was challenged in superior court by a developer who wanted to build affordable housing and citizens who desired but couldn't afford to live in the town. They argued that the effect of Chester's ordinance was that only 1.73% of land was made available for multi-family housing, while the rest was zoned for single-family two-acre lots or duplex three-acre lots, essentially precluding the possibility of affordable housing being built in the town. A master and the superior court found that the ordinance violated equal protection provisions of the New Hampshire Constitution because it put up "an unreasonable barrier to the development of affordable housing for low- and moderate-income families." The developer was granted a "builder's remedy", which sets the precedent that any future developer who challenges a zoning ordinance on the same grounds may at the court's discretion be granted the opportunity to build his/her low/moderate income project, assuming it is in compliance with all other applicable regulations.

The Supreme Court upheld the lower court decision without reaching the constitutional issue. It stated that the ordinance, as applied to the facts of this case, was an invalid exercise of the power delegated to the town by RSA 674:16, because it failed to provide for the general welfare of the community. The Court provided that the definition of "community" as used in the statute meant the entire region, and not simply the residents of a town. "As subdivisions of the State, [towns] do not exist solely to serve their own residents, and their regulations should promote the general welfare, both within and without their boundaries." However, the Court noted that striking down the ordinance would leave the Town of Chester almost completely without land use regulation, and therefore it allowed the ordinance to remain in effect, subject to the charge to the Town's legislative body to bring the Chester ordinance into line with the zoning enabling legislation and this opinion within a reasonable time.

The Court also clarified and restated in stronger language some of the issues raised by the case. It said that measures of affordability exist in the real world which could be used as evidence of availability of affordable housing, and discussed what factors should be considered in determining whether realistic opportunities exist. These factors include the type of development, the amount of land available in a town for affordable housing, and the existence of subjective requirements a developer has to meet in order to complete a project. The Court noted that planning boards have no authority to charge open-ended fees to developers, that all fees should be made clear to an applicant up front, unless unexpected circumstances arising after a completed application has been accepted mandate a change in fees.

1.15.2 ***An amendment to local zoning ordinance, which was mandated by superior court, rendered moot the plaintiff's claims for a "builders remedy" to construct his project, and for attorney's fees, and damages.***

Soares and Lewis Builders v. **Atkinson**, 129 NH 313 (1987)

A master's decision approved by superior court in 1984 declared Atkinson's ordinances exclusionary and unconstitutional in prohibiting creation of affordable housing for low- and moderate-income residents. The town amended the ordinances within the deadline set by the court, and the case was remanded to superior court. The court decided that the ordinance, as amended, was "not unconstitutional." In Soares v. Atkinson, 128 NH 350 (1986) the Supreme Court remanded the case to superior court to determine: 1) the effects of the amendment on housing construction, 2) the effect of the amendment on the exclusionary nature of the regulations, and 3) if any action taken by the town rendered the case moot.

Superior court ruled that 1) could not be answered without taking further evidence, 2) the ordinances appeared to be less restrictive, and 3) the constitutional questions in the case were moot. The builder appealed this decision to Supreme Court and asked for a "builders remedy" to allow him to complete his project, attorney's fees and damages. The Court ruled that the builder's remedy was not appropriate since the plaintiff had not been denied all use of his land, only a specific project. His relief came in the form of an amendment to the ordinance rather than through a judicial decision. Under the amended ordinance, plaintiff was entitled to build the project as proposed, after town approval, there was no "taking," and therefore no cause for damages to be awarded.

1.16 Zoning - Signs

1.16.1 A Conway ordinance allowing only certain businesses (cinema, theatre, the performing arts or establishments showing nightly live entertainment) to use readerboard signs with changeable lettering was challenged by a restaurant which was prohibited from using a readerboard. The Court said that the ordinance was not fairly and substantially related to the Town's goals of preservation of aesthetics, traffic safety and generally precluding readerboards, because there was no rational reason to discriminate between restaurants and theatres in allowing one and not the other to use readerboards, and therefore the ordinance violated equal protection.

Asselin v. Town of **Conway**, 135 NH 576 (1992)

1.16.2 ***An ordinance prohibiting signs that do not advertise a product or service sold on the premises in a residential district is not unconstitutional.***

Rockingham Hotel Company v. **North Hampton**, 101 NH 406 (1958)

The court held that a classification between signs that advertise business conducted on the premises and those that do not bears a rational relationship to legitimate public interest. Such a classification may tend to promote the general welfare or to conserve property values. Nor is it necessarily arbitrary and unreasonable for a residential village to pass an ordinance preserving its residential character, so long as the business and industrial needs of its inhabitants are supplied by other accessible areas in the community at large.

1.16.3 ***Town could not require plaintiff under its zoning ordinance to remove a sign without compensation and substitute a much smaller sign where property owner had vested right in maintaining sign as a preexisting nonconforming use.***

L. Grossman Inc. v. **Gilford**, 118 NH 480 (1978; Loundsbury v. Keene, 122 NH 1006 (1982)

No summary.

1.16.4 ***Failure of a sign ordinance to grandfather prior nonconforming uses and protect the vested right to improve and change the nonconforming use makes the ordinance unconstitutional, and the town may be subject to attorney's fees and double court costs.***

Dugas v. **Conway**, 125 NH 175 (1984)

See summary at Takings/Inverse Condemnation.

1.17 Zoning - Accessory Uses

1.17.1 ***Where a literal reading of a zoning ordinance would seem to permit only a single family dwelling as a primary use, thereby prohibiting the use of lot only as a dock, common sense requires that the ordinance be interpreted otherwise.***

Voedisch v. Town of **Wolfeboro**, 136 NH 91 (1992)

Plaintiffs were development neighbors of the McNitts, owners of a portion of waterfront neck lot. The McNitts built a dock on their property in order to have access to their island home by boat. The neighbors petitioned superior court, arguing that the transfer of a portion of the neck lot had been an illegal subdivision, that the use of the property as an "access lot" violated both the town's zoning ordinance and the development's restrictive covenants, and asking the court to order the McNitts to stop using their dock. Superior court agreed that the transfer of only part of the neck lot had been an illegal subdivison, but ruled that transfer of the rest of the lot, with the original seller's permission, would

remedy the illegality, and ordered it to be made so. The court also found that the use of the lot as a dock violated neither the ordinance nor the restrictive covenants, and plaintiffs appealed.

The Supreme Court upheld the order to cure the subdivision illegality as validly within the superior court's discretion to fashion equitable (i.e., not money damage) remedies. The Voedisches' argument that the use of the dock was an accessory use and thus prohibited by the ordinance was rejected by the majority, which stated that since there was no other building on the lot, the dock was not an accessory use but the primary use. The Court interpreted the ordinance to allow the primary use of the lot for a dock as necessarily accessory to the required single-family residential use of another lot.

The Court also determined that the ordinance's restrictions against purely access lots did not apply in this case, because the shorefront lot was not being used to provide access to any contiguous backlot, which was what the ordinance expressly prohibited. Finally, the plaintiffs argued that the restrictive covenant of the subdivision limiting the use of lots to residential purposes precluded the use of a lot for only a dock. The Court replied that "generally, covenants restricting the use of property to 'residential purposes' merely limit the use of the property to living purposes as opposed to commercial or business purposes", and upheld the trial court's finding that the use of the dock is a usual residential use regardless of whether there is a residence on the property.

2 SUBDIVISION AND SITE PLAN

2.1 Subdivision - Jurisdiction

2.1.1 ***Under the power to protect public welfare, the legislature delegated authority to local planning boards to approve subdivisions and impose conditions.***

Blevens v. **Manchester**, 103 NH 284 (1961)

The subdivision enabling statute and the Manchester ordinance were found constitutional. The power of the State to pass enabling legislation to permit municipal ordinances to regulate the subdivision of land is a proper exercise of the police power. The planning board may also impose reasonable conditions relating to location, site plan, location of the width of roads and sidewalks, the installation of necessary storm drains and sewers and restrictions on lot sizes so the subdivision will conform to the local requirements for safety, health, and general welfare of the subsequent owners of the lots. The subdivider may be made to bear the costs of local improvements that are of special benefit to the subdivision. In light of a variance procedure, it is not a retrospective law to apply the ordinance to all unsold recorded lots.

See also summary at 2.11.1 Subdivision - Vested Rights.

2.1.2 ***Absent a zoning ordinance, planning boards may not review site plans for apartment buildings under the subdivision authority.***

Conway v. Astrachan, Superior Court (1976)

In this superior court decision, it was found that plans for constructing three apartment buildings on one lot owned by one entity did not create lots. Subdivision approval authority was granted to the planning board, but no zoning ordinance existed. A subdivision requires both 1) the division of a lot into two or more lots, and 2) for the purpose, whether immediate or future, of sale, building development, etc. The court held the New Hampshire legislature specifically required a division of a tract into two or more lots for a subdivision to be found and that RSA 36:19-a (now RSA 674:43) grants site plan review power only when a zoning ordinance is in effect. Thus a sale or transfer would be required rather than merely the rental of some rooms in an apartment building.

2.1.3 ***A plan to sell stock that entitles the purchaser to the exclusive use of a cottage constitutes a subdivision plan.***

Tuftonboro v. Lakeside Colony, Inc., 119 NH 445 (1979)

A cottage colony in Tuftonboro was operated on a rental basis. Fifteen structures existed on a 2.5-acre lot. Lakeside Corporation bought the land and proposed to sell shares of stock in a new corporation, which would entitle the purchaser to the exclusive use of a cottage. The plan was viewed, as a whole, to determine if the nature of the interest to be transferred would divide the lot for the purpose of sale under the subdivision ordinance. The court found, based on "the economic reality" of the facts, that a subdivision would result, and thus the local planning board had jurisdiction. Some factors were: each purchaser was entitled to exclusive use of a specific cottage; to indefinite use; to alienate, devise or borrow against the share; and to claim tax benefits of property ownership. The court thus pierced an artificial device intended to circumvent the provision of subdivision regulations.

2.1.4 ***The jurisdiction of the planning board is limited to its subdivision definition even though it is less broad than the enabling statute.***

Dearborn v. **Milford**, 120 NH 82 (1980)

The plaintiff applied for a permit to operate a mobile home park where each site would be rented. The town contended that subdivision approval by the planning board was required under the revised enabling statute, which included division of lots for "the purpose of rent." The town's ordinance did not include rent along with sale, etc. in its definition of a subdivision. The court held that because a town may choose to exercise less power than that granted by the State legislature, the town's definition controlled.

2.1.5 ***A devise of property by will which divides land is not a subdivision under the statute.***

In re. Estate of Sayewich (**Tilton**), 12O NH 237 (1980)

A woman, through her will, divided her property among her children in parcels by reference to a map. In a fight among the children, the court addressed the issue of whether subdivision approval was required before the death of the testator to give effect to her plan. The court said "no" because subdivision law focuses on the use and orderly development of land and not its alienability. The devise was not for the purpose of development or sale. However, the devisees must comply with local subdivision regulations if they wish to develop or transfer their property.

2.1.6 ***The City Council may not base a decision to deny a sewer extension on growth-related issues, which are within the planning board's jurisdiction.***

Ehrenberg v. **Concord**, 120 NH 656 (1980)

The City Council denied an application to grant utility extensions to a project already approved by the planning board. The Council felt that further growth to the area would adversely affect the quality of life. The plaintiff appealed on the basis that the Council was sitting in quasi-judicial capacity. The court agreed that this was a judicial-type action subject to court review. The court ruled that the City Council may only consider those issues not consigned to the planning board's jurisdiction, such as technical feasibility and the best financial interests of the City. As the issue of growth was within the jurisdiction of the planning board, the Council had no authority to consider it.

2.1.7 ***The State has preempted planning board authority in control of access to state highways as condition for subdivision approval.***

JED Associates, Inc. v. **Sandown**, 121 NH 317 (1981)

See summary at 8.1.3 Preemption/Home Rule.

2.1.8 ***Where a company owns the campground and each resident has no property rights to a specific lot, no subdivision has occurred.***

LSP Associates v. **Gilford**, 122 NH 537 (1982)

No summary.

2.1.9 ***A parcel of land reserved from the sale of a large tract is not part of the "subdivision" if the use of that parcel remains the same after sale. Permission of the parcel owner is not required for the construction of clustered housing units under an ordinance which provides that owners of every lot in an approved subdivision agree.***

Saidla v. **Stratham**, 123 NH 714 (1983)

No summary.

2.1.10 ***Safety of a proposed or existing access to a state highway may be considered as a factor for subdivision approval.***

Diversified Properties, Inc. v. **Hopkinton**, 125 NH 419 (1984)

See summary at 2.5.4. Subdivision - Conditions.

2.1.11 ***Statutory requirements prevail over inconsistent regulations. Neither the municipality nor the board can extend the board's power beyond that authorized by statute. The plaintiff's appeal to the superior court must fail if sufficient evidence supports any of the board's reasons.***

Davis v. **Barrington**, 127 NH 202 (1985)

No summary.

2.1.12 ***This case identifies what is reviewable under subdivision regulations. "Subdivision" must be interpreted as it is used in the enabling statute RSA 674:35, II. The planning board has no authority to review plans to build additional facilities once it has granted subdivision approval, because no further division of land is proposed. To have such control, a board must adopt site plan regulations.***

Lemm Development Corp. v. **Bartlett**, 133 NH 618 (1990)

The Lemm Development Corp. had previously received approval for a condominium subdivision, and later decided to add tennis courts, a swimming pool and restrooms to the development. These items had not appeared on the subdivision plan Lemm had submitted to the planning board. The Bartlett Board of Selectmen denied the building permit application, saying that Lemm first needed planning board approval for the proposed additions. Lemm appealed to superior court, arguing that the Town lacked such authority to deny its permit, as the Town had no zoning ordinances or site plan review regulations. The superior court upheld the Town's denial of the permit.

The Supreme Court reversed, stating that "the nature of subdivision control, as well as the rules of statutory construction, caution us against allowing a planning board to expand its legislatively granted powers in this area. . . The subdivision of land plainly refers to the act of subdividing land, and not to the land that has been subdivided." (Interpreting RSA 674:35). The Court would not allow the developer to be penalized for not including its plans for the additional facilities in its subdivision application, as the planning board would have to adopt site plan review regulations in order to exercise the kind of control it sought here.

2.2 Site Plan - Jurisdiction

2.2.1 ***Site plan review ordinance requiring site plan approval for internal alterations of non-residential uses was found to exceed statutory authority in case decided before this case. Collateral estoppel was applied to show that the planning board lacked jurisdiction to deny conversion of retail space to office and apartment space otherwise permissible under zoning ordinance.***

Cutter v. **Durham**, 120 NH 110 (1980)

No summary.

2.2.2 If the city ordinance was not amended to authorize site plan review for multiple family units, even though enabling statute allows it, authority to do so will not be implied.

Chiplin Enterprises, Inc. v. **Lebanon**, 120 NH 124 (1980)

No summary.

2.2.3 ***Speculative building risks may be adequately considered in site plan approval.***

Gallagher v. **Windham**, 121 NH 156 (1981)

The court held that a planning board's approval of a site plan for an industrial park adequately protected the interests of the town even though no specific tenant was identified. The court agreed that factors such as odor, dust, smoke, noise, heat, glare, vibration, radiation and other protection criteria could be considered before an occupancy permit was issued by the building inspector.

See also summary at 6.1.2 Right-to-Know Law.

2.3 Subdivision And Site Plan - Hearing Procedures/Tardiness

2.3.1 ***A submitted application that does not conform to the regulations is not considered complete, and its submission will not start the statutory time period within which the board must render a decision. A letter from the planning board denying consideration of a plan until one lot conformed to the zoning acted as a denial of subdivision approval.***

Allard v. Thalheimer (**Dunbarton**), 116 NH 299 (1976)

No summary.

2.4 Subdivision And Site Plan - Disqualification

2.4.1 ***When a planning board acts as a quasi-judicial body, a board member should be disqualified if he is not indifferent. The board's decision is voidable if the disqualified member participates.***

Winslow v. **Holderness**, 125 NH 714 (1984)

Speaking as a private citizen at a public hearing, Mr. Mastro spoke in favor of a proposed subdivision. He later became a member of the board and the board approved the subdivision proposal, with conditions, by a clear majority, 6-l. Plaintiff filed suit to overturn the decision. The Supreme Court held that the planning board, in this case, was acting in a quasi-judicial capacity and would be held to stricter rules of fairness than would be required in legislative functions. Although the board's procedures are informal compared to a court, the adjudicative nature of its deliberations requires the impartiality of a jury. The New Hampshire Constitution requires that all judges be "as impartial as the lot of humanity will admit." This standard was applied in this instance.

A board member must be disqualified if the member is not indifferent to the controversy. Mr. Mastro's prior public comments indicated prejudgment, which constituted cause for disqualification. The Court held that a decision of a board is voidable if a disqualified member participated, without reference to whether the result was influenced by his vote.

2.5 Subdivision And Site Plan - Conditions/General

2.5.1 ***Conditions, subsequent and precedent, may be imposed by a planning board for approval of a site plan. On request, the board must hold a hearing prior to plan approval on whether the conditions precedent were satisfied.***

Sklar Realty v. **Merrimack**, & Agway, Inc., 125 NH 321 (1984)

Agway, Inc. sought to construct a dry feed plant in Merrimack. The planning board imposed various conditions. The Court held that RSA 36:23 (Supp. 1977) allows a board to impose conditions subsequent and precedent. A condition subsequent restricts use of the property after the building is complete. Conditions precedent are requirements to be fulfilled before building commences. The plaintiff abutter requested a public hearing on whether the conditions precedent were in fact fulfilled. The court held that the planning board is the initial trier of fact and interested parties have a right to be heard at a compliance hearing under RSA 36:23 (Now RSA 676:4 Supp. 1983). Note: 1986 amendments to RSA 676:4 clarified this ruling.

See also summary at 2.8.3 Compliance with Zoning.

Batakis v. Town of **Belmont**, 135 NH 595 (1992)

Batakis applied to the Town of Belmont Planning Board for approval of his plan to build a mobile home park on his property. Two planners had discussed his plan with him and were optimistic that it would be approved, and Batakis had also informally sounded out the planning board before buying the property. The Board held a public hearing and granted Batakis preliminary site plan approval, with 28 conditions attached. Six months later, on advice from the town's attorney, the Board changed its mind, applied subdivision standards to the plan, and denied approval without allowing Batakis to show whether or not he had complied with the conditions of the preliminary approval. Superior court found that the Board had acted unreasonably and ordered the Board to grant Batakis final approval upon satisfaction of the requirements imposed at preliminary hearings. Because there was no evidence to support the Board's abrupt change of criteria from site plan to subdivision review or denial of approval of Batakis' detailed plan, the Supreme Court upheld the superior court.

2.5.2 ***Denial by a planning board of a waiver request from subdivision conditions may be appealed to the Superior Court. RSA 36:34 (Supp. 81)[now RSA 677:15]***

Hinsdale v. Emerson, 122 NH 93 (1982)

No summary.

2.5.3 ***An assessment for water service as part of settlement was not a product of duress.***

King Enterprises v. **Manchester** Water Works, 122 NH 1011 (1982)

A condition was imposed by the Water Works that an assessment be prepaid before hook up was permitted for a proposed apartment house in a single-family district. It was to be built under a variance conditioned on proper arrangements with the Water Works. Such conditions by a government agency could amount to business compulsion or duress. To establish business compulsion, a plaintiff must show that he involuntarily accepted the other party's terms, that the coercive circumstances were the result of the other party's acts, that the pressure exerted by other party was wrongful, and that under the circumstances the plaintiff had no alternative but to accept the other party's term. The record indicated free and voluntary negotiations that resulted in a reduction of the initial assessment and elimination of a "hold harmless clause." Second, the person seeking a zoning variance knew water was a problem and delayed in contacting the Water Works until the apartments were near completion. Thus he brought the circumstance on himself. The assessment was lawful if the cost of public improvements bore some reasonable relationship to the benefit conferred upon the land. (Editor's note: Not a planning board case, but pertinent for issues covered.)

2.5.4 ***Safety of a proposed or existing access to a state highway may be considered as a factor for subdivision approval.***

Diversified Properties, Inc. v. **Hopkinton**, 125 NH 419 (1984)

The plaintiff applied to the Hopkinton Planning Board for approval of a 20-lot subdivision. The Board denied the plaintiff's application on grounds that the proposed access created an unsafe situation. The superior court reversed based on the ruling in JED v. Town of Sandown, 121 NH 317 (1981) (Section 7.1.2) that only the State may regulate access to State roads. The Supreme Court distinguished its decision in Sandown, reversed and remanded. In Sandown, said the court, the planning board denied access and thus unlawfully infringed on the state's authority to regulate state highways. In this case, the planning board denied the subdivision because the access was found to be unsafe. The court did not rule on the reasonableness of the decision denying the subdivision application, but merely concluded that the master had erred in basing his decision on the Sandown ruling.

See also 2.1.11 Jurisdiction and 8.1.3 Preemption/Home Rule.

2.5.5 ***Planning board's denial must be based on more than the mere personal opinion of its members.***

Condos East Corp. v. **Conway**, 132 NH 431 (1989)

The plaintiff submitted an application for subdivision approval of a tract of land where the only access route was along a steep, dead-end town road. The board requested a second access, which the applicant determined was not a viable option. The board received opinions from three sources - an engineer for the applicant, a UNH professor chosen by the board and paid by the applicant, and a planner from the North Country Council. All three concluded that use of the access road would not " . . . pose an unreasonable risk to current and future users . . . "

Although the applicant was willing to make improvements to the road as suggested by his engineer, the board did not propose that as a condition and based its denial primarily on insufficient access and lack of a second access. Superior court reversed. On appeal to the Supreme Court, the board emphasized its past practice of requiring a second access for similar developments. A review of five previous subdivisions determined that the board had, in fact, requested a second access. Three easily complied with the request; one could not comply, but was approved nonetheless; the fifth was given the option of improving the access road or providing a second access.

In upholding the superior court, the Supreme Court concluded that the board did not consistently require a second access for similar developments and said that the board was not justified in ignoring the uncontradicted testimony of expert witnesses. The Supreme Court did not address claims for damages because those claims had been separated from the appeal by the superior court.

2.5.6 ***Planning Board had power to deny subdivision application on grounds that the proposed dead-end road was too long and the grade too steep, even though the subdivision regulations did not contain limits on length or grade, since the Board must consider public health, safety and general welfare when reviewing subdivision and site plans.***

K&P, Inc. v. Town of **Plaistow** Planning Board, 133 NH 283 (1990)

No summary.

2.5.7 ***The planning board's review of its own decision pursuant to stipulation is analogous to a review on rehearing or reconsideration; the Board had the opportunity to affirm, reject, or modify its earlier decision.***

Deer Leap Associates v. Town of **Windham**, 136 NH 555 (1992)

Town of Windham Planning Board withheld subdivision approval of one of Deer Leap's lots contingent on a study being done to assess the impact a failed septic system would have on contiguous Rock Pond. Deer Leap appealed to superior court. During the proceeding, the parties stipulated that the Board would review its decision within a reasonably prompt time. Upon review, the Board approved the plans with restrictions on where the septic system and buildings could be, without having any study done. The Rock Pond Improvement Association appealed this approval to superior court. The superior court reversed the Board's later decision as erroneous because the "study" contingency had not been fulfilled, and Deer Leap's successor in interest appealed. The Supreme Court held that the planning board's review of its own decision pursuant to stipulation is analogous to a review on rehearing or reconsideration; the Board had the opportunity to affirm, reject or modify its earlier decision. When the Board approved the plans with restrictions at its later hearings, it was within its authority to discard the "study" contingency. "When a public body reconsiders a matter, only the final result is to be regarded as the thing done."

2.6 Subdivision And Site Plan - Conditions/Off-Site Improvements

2.6.1 ***Improvements to a gravel road adjacent to a proposed subdivision, when no other residents were on the road, were a permissible condition for subdivision approval.***

KBW, Inc. v. **Bennington**, 115 NH 392 (1975)

A subdivision bordered on a Class V highway that was between the proposed subdivision and a river. No other residents lived on the adjacent road. The planning board conditioned approval on construction of culverts and widening of the road. The majority

of the court found that, by virtue of RSA 36:22 (now RSA 673:36), grading and improving of streets was permitted as a condition precedent for approval of the plan as an off-site improvement. As long as the improvements do not shift any public burden to a private owner, such conditions are permissible in the interest of public safety, health and welfare.

The dissent found on the facts that a proportion of the costs would create a public benefit. Off-site exactions may be required of a subdivider only in proportion that bears a rational nexus to the needs created by, and the benefits conferred upon, the subdivision. (Editor's Note: The dissent is the current view.)

2.6.2 ***A condition for site plan approval requiring grant of a right of way so the adjacent street may be widened was unconstitutional without compensation.***

Robbins Auto Parts Inc. v. **Laconia**, 117 NH 235 (1977)

The plaintiff applied for approval of a site plan to construct a building for auto part sales on Union Avenue in Laconia. The city conditioned approval on the granting of an easement to the city for a ten-foot wide strip along Union Avenue for the purpose of widening the road. A condition must relate to a problem created by the proposed new building or use. Here, the requirement was to create a benefit for the general public to relieve traffic conditions. It was clear to the Court that the city, by this condition, sought to acquire the easement without going through the eminent domain process and paying just compensation.

2.6.3 ***Off-site improvement costs must be proportionally allocated between the developer and the municipality and must be limited in extent as reasonable to protect the public safety.***

Land/Vest Properties, Inc. v. **Plainfield**, 117 NH 817 (1977)

The Town of Plainfield required that a developer improve an adjacent Class V highway as a condition for subdivision approval. The court rejected a "but for" test to apportion the costs between general public benefits and the special benefits to the subdivision. The test must consider the benefits now and in the future to the public and future owners of subdivided lots. An analogy to special assessments are useful. A nonexhaustive categorization of such factors may include the standard to which the town presently maintains the roads; the frontage of the proposed subdivision; the character and potential for development of the neighborhood served by the access roads; and the number of residences presently fronting on or normally trafficking the roads. A ceiling may be imposed on the town's share based on the municipality's ability to pay. The extent of improvements required by a town must be reasonably related to the protection of public safety.

2.6.4 ***Conditions for subdivision approval requiring dedication of seven and a half percent of the land and safety improvements for general public traffic on a state highway were unconstitutional as a taking without just compensation.***

JED Associates, Inc. v. **Atkinson**, 121 NH 581 (1981)

See summary at Taking/Compensation.

2.6.5 ***A general release of all claims by a landowner when conveying land as part of a mutual agreement with the town for subdivision approval, bars all claims under a law, in effect at the time of the settlement and release, stating that it is unconstitutional for a municipality to exact land from a developer in return for approval of a development.***

Gorman v. **Pelham**, 124 NH 348 (1983)

Plaintiff negotiated with town a mutually agreeable resolution pertaining to subdivision approval. The plaintiff conveyed 11 acres to the town for purposes of open space, as required by the planning board. A general release of all claims was executed by the plaintiff in favor of the town. The Supreme Court later decided JED v. Town of Atkinson, in which it reaffirmed the earlier holding in Robbins Auto Parts v. City of Laconia, that it was unconstitutional for a municipality to exact land from a developer in return for approval of a development. In 1982, the plaintiff sought return of the 11 acres. The Court held the general release clearly barred all claims, including those under Robbins and JED.

2.6.6 ***Requirement to pay for off-site improvements requires finding of rational nexus between needs created by, and benefits conferred upon, the subdivision.***

Frisella v. **Farmington**, 131 NH 78 (1988)

The planning board granted approval of a subdivision with the condition that the applicant pay for half of the cost of improving an off-site access road. Two appeals were filed: 1) an abutter claimed that the subdivision was premature and that the planning board lacked authority to waive certain road standards, and 2) the applicant appealed the requirement to pay for the offsite improvement. The trial court consolidated the appeals and upheld the board, but ordered removal of the condition that the developer pay for the cost of improving the road as no unique benefit to the subdivision justified such a condition.

2.6.7 ***If a growth impact fee is a special assessment, then the procedures set forth in the city's charter for enactment of such assessments must be followed.***

Mooney v. **Laconia**, 133 NH 30 (1990)

The City of Laconia established an ordinance which contained a procedure for levying growth impact fees to pay for public improvements. Mooney was in the process of developing a 238-unit manufactured housing park. He claimed in Superior Court that the City lacked legal authority to enact such a fee. The court agreed, and struck down the ordinance.

The City of Laconia appealed, claiming that the growth impact fee was a "special assessment," and thus authorized by the city charter. Mooney responded that even if the City had authority, it did not follow the procedures outlined in the charter to enact such assessments, and therefore the fee assessed against him was not valid. The Supreme Court agreed with Mooney's argument, without addressing the issue of whether authority for impact fees existed or not, and invalidated the fee.

2.6.8 ***The implied intent of the Legislature was to give planning boards the authority to require off-site improvements as part of site plan review.***

Brickmaster v. Town of **Salem**, 133 NH 655 (1990)

The Town of Salem Planning Board approved Brickmaster's site plan for two industrial buildings, with the condition that Brickmaster contribute toward future road improvements near the site. Brickmaster appealed to superior court, claiming that the condition imposed was illegal, unreasonable, and not authorized by the site plan review regulations of the Town, although they were authorized by subdivision regulations. The court upheld the planning board, and Brickmaster appealed.

The Supreme Court affirmed, holding that the intent of the Legislature, while not expressly stated, was to authorize planning boards to condition site plan approval on off-site improvements. "Where off-site improvements can properly be required of a subdivider, the subdivider can be compelled only to bear that portion of cost which bears a rational nexus to needs created by, and special benefits conferred upon, the subdivision." The Court emphasized that it is at the site plan review stage and not at the subdivision stage, when more is known about the nature of a development, when the imposition of fees for off-site improvements is more likely to bear a rational nexus to the development's actual impacts.

2.6.9 ***A planning board may deny subdivision approval if it determines that the condition of access roads is so poor that the safety of present residents will be jeopardized further by the proposed subdivision. Development under such circumstances may properly be deemed to be premature and denied pursuant to RSA 674:36.***

Zukis v. Town of **Fitzwilliam**, 135 NH 384 (1992)

Town of Fitzwilliam's planning board denied Zukis' request for subdivision approval to build eight homes on her 42-acre lot. The Board found that the access roads were inadequate and unsafe, and that improving them would require an excessive expenditure of public funds. Zukis had offered to contribute to road improvement and to stagger her project so that only two homes would be built per year, and she appealed to superior court saying that the Board's decision was unreasonable. Superior court reversed the Board's decision, ruling that the Board had not considered that expenditures to improve the roads were required by existing conditions and not by the proposed subdivision, and thus to find that the expenditures would be excessive was unreasonable.

The Supreme Court reversed, noting that RSA 674:36 authorizes towns to deny subdivision approval based on grounds of prematurity and to adopt regulations setting forth criteria upon which prematurity will be determined. Fitzwilliam's subdivision regulations cited adequacy of access streets and the necessity of excessive public expenditure as items to be considered. The Board had found that the existing poor conditions of access roads presented a hazard to existing residents, that the Town couldn't yet afford to improve them, and that development which potentially exposed a larger number of people to the hazard was premature. The Court said that the planning board's application of the law was correct, and the superior court's reliance on the existing inadequacy of the access roads to find that the development was not premature was erroneous.

2.7 Subdivision And Site Plan - Impact Fees

2.7.1 ***Town planning board properly approved plaintiff's site plan subject to condition that the plaintiffs pay a "corridor allocation procedures fee," also known as an impact fee, designed to allocate the predicted expense of improvements and increased services resulting from the applicant's development; town's regulations gave sufficient notice to applicants that board could condition site plan approval by requiring applicant to contribute funds to the construction of off-site improvements. (See New England Brickmaster v. Town of Salem, 133 NH 655 (1990) and Land/Vest Properties v. Town of Plainfield, 117 NH 817 (1977).***

Unicorn Park Realty Trust v. Town of **Hudson**, 136 NH 196 (1992)

No summary.

2.8 Subdivision And Site Plan - Compliance With Zoning

2.8.1 ***Where a proposed addition to a nonconforming use greatly increases the intensity of use and would create a substantially greater deviation from the standards in an ordinance, the extension of the nonconforming use will not be permitted.***

Isabelle v. **Newbury**, 114 NH 399 (1974)

No summary.

2.8.2 ***Planning board properly looked beyond issue of zoning compliance and considered the community's future need for open space. Denial of subdivision approval did not affect a taking where the lots at issue were not fit for use intended by subdivider.***

Patenaude v. **Meredith**, 118 NH 616 (1978)

Developer requested approval to subdivide l00-acre tract into three sections, with a portion reserved as common land. Planning board denied approval, based on the poor quality of much of the land, the presence of wetlands in some of the building lots and steep slopes in the common land. RSA 674:36, II authorize a planning board to require that open space be set aside. The Town of Meredith had developed a comprehensive plan on which the open space requirement was based. The court ruled that the Town's requirements were reasonable and that the land itself necessitated leaving more usable land to provide an adequate recreational area for the potential subdivision residents.

2.8.3 ***A revised site plan must be resubmitted to a ZBA to determine whether a special exception based on the initial plan should survive the revision.***

Sklar Realty v. **Merrimack** & Agway, Inc., 125 NH 321 (1984)

Agway, Inc. sought to construct a dry feed plant in the Town of Merrimack. Agway submitted a site plan and applied to the ZBA for a special exception to the zoning ordinance to allow it to build in a wetlands area. The ZBA granted the exception with conditions. Later Agway revised the plan to address concerns of the planning board. An abutter challenged whether the special exception was still valid after the plan had been revised. The court held that the plan must be resubmitted to the ZBA for its determination whether the special exception survived the revision.

See also summary at Conditions/General.

2.8.4 ***Planning board's action in denying approval of a site plan for lack of the required frontage along a public right-of-way was proper. The board has no authority to approve plans not conforming to zoning requirements, and is not bound to approve an application simply because it has the power to impose conditions.***

Morin v. **Somersworth**, 131 NH 253 (1988)

No summary.

2.8.5 ***A mobile home park is considered a commercial use requiring a special exception. Although a ZBA has authority to grant special exceptions under RSA 674:33, IV, it cannot waive the requirement that one be obtained.***

Mudge v. Precinct of Haverhill Corners, 133 NH 881 (1991)

Mudge was abutter to a landowner who wished to expand her mobile home park. Owner had a 42.47-acre tract on which there were 22 mobile homes on a 5.5-acre piece, and 14.8 acres of which were undevelopable due to wetlands and steep slopes. The owner argued that her proposed cluster development, putting 22 more mobile homes onto the remaining 22.5 acres, would not violate the one-acre per unit density required by ordinance, since her 5.5-acre park was a separate lot and a grandfathered subdivision. She obtained a building permit and subdivision approval, and Mudge and another abutter appealed to the ZBA. The ZBA denied the appeal, voted unanimously that the proposed use was commercial in nature and thus required a special exception, but then voted to waive the special exception requirement. The superior court upheld the building permit and ruled that no special exception was required because the 5.5-acre park was a preexisting nonconforming use on the single 42.47-acre tract.

The Supreme Court reversed. The owner maintained that the two parks were on separate parcels, and offered as proof the fact that the town assessed the existing park separately for tax purposes, and that the Water Supply and Pollution Control Council had approved a subdivision plan on it in 1971. However, the Court said that neither of these facts showed that the 5.5-acre tract was a separate parcel, since the planning board has exclusive jurisdiction over subdivisions of land under RSA 674:42 and had never granted subdivision approval on the property, and the superior court had specifically held that the property was a single lot. Thus the existing mobile home park at the time of the enactment of the zoning ordinance was in compliance with the density requirement, having more than one-acre of developable land per unit (22 units on 42 acres), and could not be a nonconforming use.

The Court stated that the ZBA had been correct in finding that the proposed mobile home park was a commercial use requiring a special exception, but that it had erred when it waived the requirement. A special exception can only be supported by factual findings meeting the statutory requirements set forth in the ordinance for a special exception, the ZBA has no authority to simply waive the application of the law. A lesser issue was whether surface area of rights of way should be included when measuring density. The Court provided that "in computing the size of lots, land contained in streets, public or private, which give access to the lot is excluded."

2.9 Subdivision And Site Plan - Premature Development

2.9.1 ***A board may properly consider the danger posed by an existing access road to deny a subdivision plan.***

Garipay v. Town of **Hanover**, 116 NH 34 (1976)

Garipay proposed a 49-lot subdivision on top of a hill with a narrow, steep and winding access road. The planning board denied the plan based on the serious danger posed by additional travel on the access road. Garipay appealed, claiming the town may not consider off-site issues. The court held that, as part of the statutory authority to prevent "premature development," the hazards posed by the condition of the access road may be considered. The board had the authority to find that, although the road currently serviced 18 homes, an additional 49 homes would endanger the well-being of present and future residents. (Editor's note: later cases remind a town of the duty to expand services, which includes roads, in good faith to accommodate growth.)

2.9.2 ***A planning board may deny subdivision approval if it determines that the condition of access roads is so poor that the safety of present residents will be jeopardized further by the proposed subdivision. Development under such circumstances may properly be deemed to be premature and denied pursuant to RSA 674:36.***

Zukis vs. Town of **Fitzwilliam**, 135 NH 384 (1992) See summary at 2.6.9

2.10 Subdivision And Site Plan - Standing Of Aggrieved Party

2.10.1 ***Nonabutters may appeal from planning board decisions provided they have a definite direct interest in the outcome.***

Weeks Restaurant v. **Dover** and Sambo's, 119 NH 541 (1979)

Sambo's Restaurant obtained approval of a site plan for a restaurant on the same traffic circle as a Week's Restaurant. The court held that aggrieved parties should be judged similarly to ZBA appeals. A planning board may hear evidence from people based on proximity to proposed site, type of change proposed, immediacy of the injury claimed, alleged adverse impact on a business other than by increased competition, and whether the plaintiff participated in the administrative hearings. The presence of anticompetitive motives, by itself, does not deprive the plaintiff of standing. Weeks had concerns for traffic circulation and parking, which would affect their property, and so they had standing in this case.

2.10.2 ***Pursuant to RSA 677:15, II, the court has discretion to allow an appeal upon review of petition and other documents to determine whether they present a basis for review. Where property owners had participated in the hearings before the planning board, they had standing to seek certiorari for review of the board's decision.***

Price v. Planning Board City of **Keene**, 120 NH 481 (1980)

One plaintiff owned property across the highway from the proposed site while the other owned a right-of-way across it. They had participated in the hearings before the planning board and their property would be affected by the proposed development, and so were granted standing to appeal subdivision approval.

2.10.3 ***Because plaintiffs had not submitted an affidavit verifying the factual allegations supporting their objections to a motion to dismiss due to lack of standing within ten days as required by Superior Court Rule 57, these objections could not be considered by the court on appeal.***

Ossipee Auto v. Town of **Ossipee**, 134 NH 401 (1991)

No summary.

2.11 Subdivision And Site Plan - Vested Rights

2.11.1 ***Streets laid out in a subdivision plan, but not accepted by the town, may not form the basis for vested rights to develop adjacent lots without subdivision approval.***

Blevens v. **Manchester**, 103 NH 284 (1961)

The Court discussed the status of paper streets recorded prior to enactment of subdivision regulations. Plaintiff had recorded maps that indicated streets, which were not accepted by the city, nor were the adjacent lots sold as of the date of the new subdivision ordinance. The Court held that neither paper streets nor the fact that some lots were previously sold on accepted streets gave the plaintiff vested rights to demand that future sales be beyond the purview of subdivision requirements. Furthermore, a planning board may require all proposed streets to be accepted by the city council before approval of a subdivision plan.

See also summary at 2.1.1. Subdivision Jurisdiction.

2.11.2 ***If a site plan is applied for but not acted upon, vested rights may accrue, but preliminary costs alone are not a basis for vested rights.***

Gosselin v. **Nashua**, 114 NH 447 (1974)

Plaintiff applied for site plan approval of a shopping center on May 31, 1973. After requests for minor changes and seven additional proposals, the proposal was rejected on October 4, 1973. Effective on January 1, 1974, the district was reclassified to prohibit shopping centers. The Court held that a subdivision approval which is applied for, and not granted, is similar to a building permit being issued and subsequently revoked. An owner who, relying in good faith on the absence of any regulation which would prohibit his proposed project, has made substantial construction on the property or has incurred substantial liabilities relating directly thereto, or both, acquires a vested right to complete

his project in spite of the subsequent adoption of an ordinance prohibiting same. However, costs related to the site plan application process are preliminary expenditures, which do not establish vested rights. The city showed no inequitable conduct to preclude enforcement of a restrictive ordinance and negotiated in good faith.

2.11.3 ***Where a mobile home park had a recorded plan to lease and eventually sell the individual lots and that plan was grandfathered by the zoning ordinance, the planning board had no authority to restrict lot sizes.***

Seabrook v. Tra-Sea Corporation, 119 NH 937 (1979)

The plan was recorded prior to enactment of either subdivision regulations or a zoning ordinance. The zoning ordinance, when enacted, contained a grandfather clause exempting prerecorded lots from provisions of the ordinance. The court ruled that absence of a grandfather clause in the subdivision regulations was immaterial because the clause in the zoning ordinance made the lots conforming; without such a clause, subdivision approval would have been required before the lots could be sold.

A planning board may impose conditions when necessary for the harmonious development of the municipality and its environs and for "open spaces of adequate proportion." Here the change from rental to ownership of lots would not increase municipal burdens or effects on the town so no conditions could be imposed. Finally, sale of lots does not constitute an expansion or change of a nonconforming use when the lots were previously leased for the same use. The planning board, therefore, could not enjoin the sale of the lots.

2.11.4 ***Where no review process existed at the time of the recording of a subdivision plan, substantial economic hardship is the test of the extent of vested rights.***

Henry and Murphy, Inc. v. **Allenstown**, 120 NH 910 (1980)

The statutes, RSA 36:2 et. seq., (now RSA 673:1) do not apply when a subdivision is recorded before adoption of subdivision regulations. The plan was recorded in 1968, and a minimum lot size was imposed in 1970. In 1978, 34 lots in the subdivision were sold and the developer sought to sell the remaining 16 lots free of the lot size requirement. The court held that substantial improvements had been made in good faith on reliance of the town's ongoing approval of the plan filed in 1968 and thus the developer or its successors in interest had a vested right to complete the entire project. The extent of substantial reduction in the value of the land if an ordinance is applied may be considered in determining whether the developers' rights have vested. Here the lot size change would reduce the total worth of the remaining lots so a vested right to develop sixteen lots was found. However, restrictions subsequently adopted, such as zoning for single and two-family homes, may be imposed if reasonable and do not affect the vested rights of the plaintiff.

2.11.5 ***The planning board may not approve a site plan that violates the express provisions of a zoning ordinance passed after the first application to the planning board. No vested rights accrue because no actual construction costs were paid.***

Cesere v. **Windham**, 121 NH 522 (1981)

No summary.

See also **Freedom** v Gillespie, 120 NH 576 (1980) and Biggs v. **Sandwich**, 124 NH 421 (1984) at Police Power - Wetlands and Waste Disposal 3.2.3 and 3.2.4.

2.11.6 ***Failure to demonstrate any substantial detrimental reliance on a foundation permit for a structure later prohibited by ordinance precludes accrual of vested rights.***

Socha v. **Manchester**, 126 NH 289 (1985)

No summary.

2.11.7 ***Sale of nonconforming lots are contingent on subdivision approval by the planning board.***

Chasse v. **Candia**, 132 NH 574 (1989)

Subdivision plat showing 93 quarter- to half-acre lots was prepared in 1956, but never recorded. In the intervening years, lots fronting on the public highway were conveyed and developed. Since plaintiff acquired the remaining parcel in 1965, he has conveyed lots to his sons, but has not recorded the plan nor made any of the improvements shown on the plan. Following a view, the master found that the lots were not "grandfathered" under RSA 674:39 because there was no evidence of substantial development that would constitute a vested right to exemption from changes in the zoning requiring larger plots.

2.12 Subdivision And Site Plan - Equitable Servitude

2.12.1 ***The fact certain waterfront lots were "reserved" indicated that restrictions on other lots in a common scheme of development did not apply.***

Fournier v. Kattar (**Moultonborough**), 108 NH 424 (1968)

No summary. Common law applied where there was no subdivision regulation or zoning ordinance.

2.12.2 ***A restriction to residential use only is enforceable as an equitable servitude against an owner in a subdivision having constructive notice of such a restriction on other lots within the subdivision, if such restriction is part of the general scheme of development. Constructive notice will be found if the restriction is within the chain of title. The finding of an equitable servitude is within the discretion of the court. Here, the existence of an equitable servitude was found not to bar the construction of a limited access road which was within the general scheme of the subdivision.***

Arnold v. Chandler (**Bedford**), 121 NH 130 (1981)

No summary.

3. POLICE POWER

3.1 Police Power - Redevelopment/Blighted Areas

3.1.1 ***A town may use its eminent domain power to redevelop a blighted area although an individual property in that area is not in disrepair.***

Velishka v. **Nashua** and Nashua Housing Authority, 99 NH 161 (1954)

No summary.

3.1.2 ***Open land may be condemned for redevelopment purposes only if it is to be put to a use which directly benefits the public, such as for a school, playground, or utility line, and not to a use that has only incidental public benefit.***

Merrill v. Manchester and **Manchester** Housing Authority, 127 NH 234 (1985)

Plaintiffs appealed from a superior court decree which denied their petition to enjoin defendants from taking their land by eminent domain for an industrial park. The land in question consists of 26 acres of industrially zoned land, of which 23 acres is held under current use assessment as forest land. In enacting current use legislation, the legislature determined that the preservation of New Hampshire's open spaces is in the public interest. No evidence was presented to suggest the presence of a blighting condition that would pose actual harm to the community so the land could be condemned only for uses that would directly benefit the public. The proposed industrial park would provide benefits only to the private sponsors and participants. The Court reversed the lower court ruling and ruled that condemnation authority could not be used with respect to this particular parcel.

See also 9.1.3.

3.2 Police Power - Wetlands And Waste Disposal

3.2.1 ***An elevated leach field in a low area could reasonably have an adverse effect on drainage and injurious effect on the neighborhood so the denial of a building permit was valid.***

Carbonneau v. **Rye**, 120 NH 96 (1980)

No summary.

3.2.2 ***A town may not impose an oppressive and unreasonable burden on a person whose religious belief precludes use of a septic tank if an alternative dry compost toilet posed no health hazard.***

Carey v. **Westmoreland**, 120 NH 374 (1980)

Plaintiffs are Quakers whose religious belief includes simplicity of life. They installed and used a State approved dry compost toilet because their home had no utilities, no plumbing, and no running water. The town zoning ordinance required a septic tank and the ZBA denied a variance. The Court found the order oppressive and unreasonable. Unnecessary hardship is only one requirement for a variance. The only purpose of requiring a septic tank is to protect the health of a community. Here, liberty as a cornerstone of our society is balanced against the necessity of the requirement under the police power. The dry compost toilet posed no health hazard so it was unreasonable to impose the ordinance. The Court held the application of the ordinance was invalid in these circumstances.

3.2.3 ***Setback requirements for waste disposal systems near watercourses are valid. Control of effluent into watercourses is a legitimate public purpose for which regulation under the police power by a planning board is appropriate. Expenditures such as plans and percolation tests are merely preliminary and do not support the accrual of vested rights to build a septic system closer than setback requirements allow.***

Freedom v. Gillespie, 120 NH 576 (1980)

No summary.

3.2.4 ***A wetlands protection ordinance may impose setback requirements for septic systems and issuance of building permits. Actual knowledge of a pending ordinance prevents vested rights from accruing.***

Biggs v. **Sandwich**, 124 NH 421 (1984)

The town adopted a wetlands protection ordinance in 1980 containing the requirement that all septic tanks and leachfields be set back 125 feet from any wetlands. The plaintiffs, with knowledge of the proposed wetlands ordinance, signed a purchase and sale agreement for a lot bordered by wetlands. A septic system was approved by the New Hampshire Water Supply and Pollution Control Commission and constructed by March 1980. Plaintiffs were denied a building permit under the new wetlands ordinance, and the ZBA denied petition for a variance. The superior court upheld the ZBA decision and the Supreme Court affirmed. A floodplain ordinance requiring filing of an "intent to build" had not been complied with. Plaintiffs clearly had actual knowledge of the proposed ordinance, and so could not claim vested rights had accrued despite installation of the septic system. The Supreme Court held that the violation of the floodplain ordinance and notice of the wetlands ordinance were sufficient reasonable basis for the ZBA's decision. A buy-back clause in the purchase and sale agreement indicated a self-imposed risk if permits were not obtained, so no inverse condemnation occurred warranting compensation by the town.

3.3 Police Power - Mobile Homes

3.3.1 ***Special exception requirement for a mobile home park is justified by its higher density. See RSA 672:32.***

Jensen's Inc. v. **Dover**, 130 NH 761 (1988)

The Board of Adjustment denied the application for a special exception that was required by the zoning ordinance for development of a mobile home park. The board expressed concern for the impact on land values in the neighborhood and the creation of hazardous traffic conditions - two of the conditions listed for approval of a special exception. In an appeal, the plaintiff claimed that the ordinance requirements are not consistent with the statutory requirement to provide "reasonable and realistic opportunities" for the placement of manufactured housing. In affirming the board's denial, the Supreme Court pointed out that " . . . municipalities have been granted the sole discretion to impose reasonable restrictions, within the limitations of the enabling statute, upon the development of mobile home parks." and concluded that " . . . the significant difference in density between a mobile home park and a conventional or manufactured housing subdivision justifies the distinction in the regulatory requirements." (i.e., special exception).

3.3.2 ***A building code does not apply to mobile homes unless expressly stated. Mobile homes existing before enactment of mobile home ordinance have a vested right to continue subject to health and safety, e.g., sanitary, regulations.***

Manchester v. Webster, 100 NH 409 (1957)

No summary.

3.3.3 ***An ordinance which restricted mobile homes to existing parks and set up a permit system with fees was found valid.***

Plainfield v. Hood, 108 NH 502 (1968)

No summary.

3.3.4 ***An ordinance which divides a town into three districts and imposes restrictions to preserve the characteristics of the area has the effect of zoning and must be passed pursuant to statutory procedures of the zoning enabling statute to be valid.***

Bisson v. **Milford**, 109 NH 287 (1969)

No summary.

3.3.5 Neither ignorance nor nonenforcement, of a mobile home ordinance are valid defenses for violation of the permit system.

Weare v. Roland J. Stone, 114 NH 80 (1974)

No summary.

3.3.6 ***A building permit system for mobile homes is not comprehensive regulation of zoning, serves a valid public purpose, and is not a "taking."***

Village House, Inc. v. **Loudon**, 114 NH 76 (1974)

The Town of Loudon passed an ordinance restricting all mobile homes to approved parks and set regulations before permits could be issued. The plaintiff was denied a permit and attacked the constitutionality of the ordinance. The court held that, although mobile home ordinances constituted half of those passed by the Town, they are not a comprehensive scheme of regulation with the creation of districts that would be zoning. Secondly, reasonable limitation and regulation of mobile homes are a valid police power. The ordinance did not exclude or restrict the permits other than the mobile homes. It was not a taking since other uses of the plaintiff's land remained. To be compensable, the damage must be substantial and severe enough to constitute a deprivation of use or enjoyment of property.

3.3.7 ***A cap on the number of mobile home park permits may not deprive a park owner of the right to occupy each developed site that existed before the enactment of a zoning ordinance.***

Grondin v. **Hinsdale**, 122 NH 882 (1982)

The plaintiff owned and operated a mobile home park in Hinsdale. The l56-developed lots were grandfathered by a 1970 ordinance that limited the issuance of future permits for mobile homes. The plaintiff purchased the park in 1979 and was denied permits for the l56 sites. The court held that a successor in interest is entitled to exercise all the vested rights which belonged to the original developer. Assuming the nonconforming use continued uninterrupted and without abandonment, as was the case, the selectmen had the authority to, and must, issue all l56 permits regardless of whether each site was occupied on the date the cap went into effect.

3.3.8 ***Pope v. Town of Hinsdale, 137 NH 233 (1993)***

Town of Hinsdale's ordinance prohibiting manufactured housing parks and forbidding expansion of existing (grandfathered) manufactured housing parks was found not to violate the legislative goal of providing reasonable opportunities for the siting of manufactured housing, because manufactured housing was allowed on individual lots. The sole question argued in this case was whether Hinsdale was a municipality "permitting manufactured housing parks". The majority said no, because the town chose a way other than permitting to fulfill its obligation to provide manufactured housing. Dissenting justices argue that the town could not validly prevent expansion of grandfathered vested rights.

3.3.9 ***Because a town's mobile home zoning ordinance did not comply with the state statute on the date it became effective, no regulation for placement of mobile homes existed as of that date. A mobile home could be placed on any lot and became a legal nonconforming use when the ordinance was amended to comply with the statute.***

Plainfield v. Sanville, 125 NH 825 (1984)

No summary.

3.3.10 ***Town's zoning ordinance restricting placement of mobile homes was found invalid as a violation of the constitutional guarantee of equal protection under the law. To require all mobile homes to be set back 500 feet from any paved road did not bear a substantial and fair relationship to the stated goal of preserving the character of the community.***

Chesterfield v. Brooks, 126 NH 64 (1985)

No summary.

3.3.11 ***Municipal ordinances regulating mobile home parks carry a presumption of validity which a plaintiff must overcome. As the Deludes had failed to present their proposal for a mobile home park to the Amherst Planning Board nor applied for a variance from the***

ordinance, the superior court dismissed their action as unripe. The Supreme Court agreed, but on remand allowed the Deludes to file a declaratory judgment petition setting forth specifically and clearly the facts they allege make the ordinance facially unconstitutional.

Paul and Shirley Delude v. Town of **Amherst**, 137 NH 361 (1993)

No summary.

3.4 Police Power - Condemned Buildings

3.4.1 ***RSA 155-B:9 mandates that the expense of removal of a condemned building becomes a lien if the town is obliged to remove it after the time prescribed by the district court's removal order has elapsed.***

Town of **Hanover** v. Nathan Baker, 133 NH 750 (1990)

No summary.

4 ROADS/ACCESS

4.1 Roads - Municipal Roads

4.1.1 "Occasion" to lay out a public highway pursuant to RSA 231:8 exists if the public interest requires acceptance of the road by the town. This determination involves the balancing of the public need for the road outweighs the burden the road would impose on the town.

Rockhouse Mountain Property Owners' Assoc. v. Town of **Conway**, 133 NH 130 (1990); Locke Development v. **Barnstead**, 115 NH 642 (1975)

No summary.

4.1.2 ***Local ordinance found invalid when infringement on private property rights is greater than necessary to carry out the public objective.***

Powers v. **Hampton**, 125 NH 273 (1984)

By municipal ordinance voted at town meeting, a 24-foot wide private way was designated a fire lane. The owner had used the way for six angle-in parking spaces which was effectively prohibited by the passage of the ordinance. Municipal ordinances are presumed valid. The court balanced the Town's public safety objective of facilitating the quick entrance of emergency vehicles to this area with the loss of individual property rights. The property owner had a prescriptive easement to park cars in the private lane. The Town could not infringe on this property right more than necessary to accomplish its legitimate objective. The court held that the entire width of the lane was not necessary for

emergency vehicles and that alternative ways to mark a fire lane on a gravel road were possible so the ordinance was declared invalid.

4.1.3 ***Approval of a subdivision plan by a planning board does not constitute acceptance of any street shown on the plan. Therefore planning board had no power to avoid application of statute which released and discharged from all public servitude any street dedicated to public use which had not been opened, built or used within 20 years of dedication.***

Polizzo v. **Hampton**, 126 NH 398 (1985)

The street was plotted on the plan of a subdivision, which was approved by the Hampton Planning Board on February 11, 1960. The land in question was never developed or used as a street. Plaintiffs brought action in April 1983, seeking to quiet title to the 50-foot strip. Because it was undisputed that the strip was never opened or used as a street, acceptance could only have occurred through a final vote by the Hampton Town Meeting prior to February 11, 1980. Case was remanded to the superior court for the limited purpose of making a finding whether there was such a formal acceptance. If there was, RSA 231:51 cannot be applied to defeat the town's rights, and the plaintiff's petition should be denied. If there was no formal acceptance, RSA 231:51 applies and the petition should be granted.

4.1.4 ***There is no cause of action for damages for a town's refusal to lay out certain roads based on alleged impairment of plaintiff's rights to equal protection under the State constitution.***

Rockhouse Property Owners v. **Conway**, 127 NH 593 (1986)

The Conway Planning Board approved the subdivision although the right-of-way as planned and constructed did not meet town road standards. The developer sold lots with covenants requiring the lot owners to pay water and right-of-way maintenance charges for as long as he chose to provide the services. After the developer ceased maintaining the right-of-way, plaintiffs made several requests and petitioned to selectmen to lay out town roads. Selectmen denied all requests. Plaintiffs petitioned superior court seeking money damages, based on state and federal constitutional grounds.

Supreme Court upheld superior court denial of the petition. The Court said remedy for refusal to lay out the road is by appeal to superior court of the denial of the lay out petition. Damages are not an appropriate remedy. Plaintiffs also claimed inverse condemnation as an indirect taking. The Court ruled that there was no taking since the property value had not been decreased by the selectmen's failure to act, although it may have increased if the roads had been layed out.

4.1.5 ***Proposed road is not a "public highway" that meets frontage requirements until it has been dedicated and accepted.***

Morin v. **Somersworth**, 131 NH 253 (1988)

Planning board did not have to give conditional approval to a site plan review application when the proposed road that would provide the required frontage on a public highway had not been dedicated and accepted by the City.

4.1.6 ***Road agents' certification that road met town standards for a gravel road did not constitute town acceptance as a Class V road or a private road built to town standards.***

Goslin v. **Farmington**, 132 NH 48 (1989)

No Summary.

4.1.7 ***Roads shown to have been made public highways by prescriptive use and found to have been maintained by the Town as Class V roads must continue to be so maintained. To be established by prescription, a public road must have been used by the public openly under a claim of right, without the owner's permission, continuously for 20 years prior to 1968. (RSA 229:1). The correct legal standard of proof of continuous public use is by a preponderance of evidence that the road was used in a manner consistent with its character.***

Catalano v. Town of **Windham**, 133 NH 504 (1990); See also Leo v. State, 117 NH 209 (1977).

No Summary.

4.2 Roads - Right Of Access

4.2.1 ***A landowner has a vested right of access only to a system of public highways and not to a particular means of access, which may be altered without constituting a "taking".***

Merit Oil Inc. v. **State of New Hampshire**, 123 NH 28 (1983)

The plaintiff owned a gasoline station at an intersection. The State constructed median strips to improve traffic safety but which prevented access to the station by eastbound traffic. The court found no property right in the continuation of the flow of traffic past the land based on a vested right of access. The construction merely altered the flow of traffic and did not physically change the actual entrance ways to the property.

4.2.2 ***Abandonment of an easement must involve clear action by owner of the dominant estate or adverse possession by the servient tenant for 20 years.***

Titcomb v. Anthony (**Hillsboro**), 126 NH 434 (1985)

No summary.

4.2.3 ***Nonuse of an easement for more than 40 years, building of fence with no access gates by the easement owners, and the growth of two trees within the designated easement area that restrict vehicular access do not extinguish the easement in whole or in part.***

Downing House Realty v. Hampe (**Concord**), 127 NH 92 (1985)

An access easement was created in 1882. Since that time, the owners of the easement have erected a fence which restricts access from the easement to their land, two trees have grown which restrict vehicular access and the easement has not been used for 40 years or longer. The plaintiff recently renovated and improved its building and premises, and sought to use the passway. The superior court decreed that the easement had not been abandoned and the use being made of the easement was reasonable. The Supreme Court affirmed that the present use is not an unreasonable expansion of the original grant and stated that the owners of the property on which the easement exists have no right to insist that the user of the easement gain access by another available means.

4.3 Roads - Discontinuance

4.3.1 ***Owner of property abutting a public road cannot recover damages for the discontinuance of the road if there is an alternative means of access to his property.***

Wolfe v. **Windham**, 114 NH 695 (1974)

Plaintiff owned a 60-acre tract with approximately 1,750 feet of frontage on Spear Hill Road, a public road partially within the Town of Windham. After learning of the proposed closing of Spear Hill Road, plaintiff presented a preliminary subdivision plan comprised of seven lots bordering the road. Plaintiff's motive was to make clear the intent to eventually sell the seven lots. The preliminary plan was endorsed by the board; formal approval was not required since Spear Hill Road was still in existence. Two weeks later, the selectmen voted to discontinue most of Spear Hill Road, leaving plaintiff with about 227.5 feet of access to the public portion of the road. Court denied claim for damages since plaintiff had access to the property over the open portion of Spear Road, a right-of-way over the closed portion, and by means of two other public roads. Dissent argued that the reasonableness of alternative access should have been considered by the jury in deciding whether to award damages.

4.3.2 ***A road laid out in 1831 and not used for the past 20 years was not discontinued by abandonment.***

Davenhall v. Cameron (**Farmington**), 116 NH 695 (1976)

An old road was officially laid out in l83l. The road had not been used for 20 years and the evidence was unclear whether the town discontinued the road by vote. The court held that nonuse or abandonment by the public never constitutes discontinuance of a highway because one cannot acquire a private interest in a public highway by adverse possession. Secondly, a highway once established is presumed to exist until discontinued. Thus the person claiming the road to be private must prove that a town vote discontinued that particular stretch of road. Lacking clear evidence, the highway was presumed to be still public.

4.3.3 ***A public road may arise by prescription when public use, continuous although slight, has been made of the road.***

Leo Foundation v. State, (**Gilmanton**) 117 NH 209 (1977)

In the course of a trial on the ability of the state to lay out a road to Manning Lake in Gilmanton, the status of the way was an issue. Roads may be dedicated to a town or may become public highways by continuous public use, i.e., "prescription." Continuous means not interrupted by assertion of any paramount right, such as a trespass action. The evidence was that members of the public used the road to gain access to the lake as far back as residents could remember. The Court held that intermittent travel by the public, even of slight volume, was sufficient to establish a public easement by prescription, the use being characteristic of the kind of road. Once public, nonuse for any significant period of time or adverse private use would not constitute a discontinuance of a public highway. Therefore, the state could establish the road as a public highway without compensation to the abutter who claimed ownership of the way.

4.3.4 ***A town may discontinue a road by popular vote.***

Williams v. Babcock, (**Stoddard**), 121 NH 185 (1981)

Based on old town maps, deeds, and histories, the trial court found the road in question to have been a public road laid out in l788. A town vote in 1968 was found to have discontinued the road. The road extends to the adjacent Town of Washington, but only a part has been maintained. The court followed a rule set forth in l894 in Drew v. Cotton that a road laid out by the selectmen wholly within a town may be discontinued by local vote.

Other possibilities discussed, but not applicable in this situation include: If one town lays out a road to connect with a preexisting road in a neighboring town, neither road extends "beyond the limits" of either town. A road laid out to extend between two towns may only be discontinued on petition to the Supreme Court. A road not laid out by the selectmen may only be discontinued by petition to superior court.

Two dissenting judges (the fifth did not sit) would have overruled the l894 decision and required Supreme Court approval for discontinuation.

4.3.5 ***The power of selectmen to regulate streets does not include the authority to contract with abutters for the right to obstruct or discontinue a public way, which may be done only by vote of the town.***

Marrone v. **Hampton**, 123 NH 729 (1983)

No summary.

4.3.6 ***Landowner should be able to seek damages for the discontinuance of a municipal road. If the court or jury is persuaded that the access is not reasonable owner should be permitted to recover damages.***

Orcutt v. **Richmond**, 128 NH 552 (1986)

Plaintiff owns three tracts of land in Richmond with frontage on Green Woods Road and the discontinued portion of that road, known as Tulley Brook Road. When the Town voted to discontinue Tulley Brook Road, one of these tracts, consisting of nine acres, had no frontage on a Class V or town maintained road. Plaintiff sued, challenging the discontinuance and requesting damages. The trial court dismissed the request for damages. The highest Court reversed and remanded in favor of the plaintiff. The Court noted that the trial court did not address the issue of reasonableness of the remaining means of access with reference to the existing use of the land.

Note: Reference to Wolfe v. **Windham**, 4.3.1.

4.3.7 ***The mere fact that a road is regularly traveled is not sufficient to make it a Class V road.***

Glick v. **Ossipee**, 130 NH 643 (1988)

Plaintiff purchased property on a road that had not been maintained by the town for 30 years. It was regularly traveled by loggers, hunters, and fishermen, but had not been formally designated as a Class VI road. Some emergency repairs were made after some flooding. When several town meetings declined to accept the road as Class V, the plaintiff brought suit to compel the town to maintain the road as a Class V highway. Superior court determined that the road was Class V because it was continuously traveled, the town had done some repairs within five years, and there were no gates and bars.

On appeal, the Supreme Court reversed, disagreeing with the plaintiff's argument that a Class VI road must be both untraveled and unmaintained. The Court noted that formal discontinuance is required to terminate the public's right to travel over a road; Class VI

roads remain full public highways even though no longer maintained. The Court agreed with the town that nonmaintenance will not encourage towns to neglect roads because of the Penalty for Neglect that can be imposed under RSA 231:82. The town's option to reclassify a road through nonmaintenance allows the town to control expenses by restricting development where roads are inadequate and carries out the legislative intent that the municipality "retain ultimate responsibility for its financial integrity."

(See Chapter 97, Laws of 1990.)

4.3.8 ***Building permit properly denied when frontage is on a road that the town voted to close.***

Vachon & Paige v. **New Durham**, 131 NH 623 (1989)

Plaintiffs own abutting parcels of 45 and 88 acres, whose only frontage is a road closed by the town in 1935. They were denied a building permit because their property was not on a Class VI road, as required by policy adopted by the board of selectmen. On a rehearing, the ZBA included in its reasons for denial the poor condition of the road, difficulties of rescue vehicles in reaching the properties, and the financial impact on the town from injuries to employees and town equipment and potential liability claims. An offer of waivers of immunity by the property owners did not allay the ZBA's concerns.

The superior court ruling, affirmed by the Supreme Court, rejected plaintiff's argument that the road was a private road because the 1935 "closing" did not place gates and bars on it. The Court also agreed that the waiver of immunity was not sufficient to protect the town from liability claims from third parties who might occupy the properties in the future.

The Court based its decision on the statutory language in RSA 674:41 and did not address arguments based on the town's Class VI road policy. The Court concluded that RSA 674:41 clearly applies to all building permit applications and rejected plaintiffs' argument that the requirements of RSA 674:41 did not apply to their situation because they were not seeking to subdivide their property.

4.4 Roads - Reclassification

4.4.1 ***Reclassification of highway status entitled owner of affected billboard on adjacent private property to a proper notice of the reclassification.***

Appeal of Clement, **NH DOT**, 124 NH 503 (1984)

A pharmacy owner maintained a billboard on private property along a highway. Until l976, the billboard complied with all applicable regulations. In l976, the highway was reclassified from a federal aid secondary to a federal aid primary highway. This reclassification subjected the billboard to a state statute under which it became a nonconforming use that requires a permit for its continued existence. The owner objected

to the reclassification and sought a hearing before the Department of Public Works and Highways. The hearing resulted in the Department declaring the billboard to be a nuisance and ordering its removal. The owner appealed, claiming that the highway was reclassified without a hearing or proper notice.

The Court agreed with the owner, and reversed the lower court's ruling, after finding that the owner was inadequately notified about the highway reclassification. The Court said that the state reclassified the highway with knowledge that such action would be more restrictive concerning billboards. This action was, in effect, a regulation requiring proper notice and an opportunity for interested parties to present their views. The Court noted that "notice" must be sufficiently clear that a man of ordinary intelligence need not guess at its meaning. In contrast, the Court said, the notice in this case did not even mention reclassification and was, therefore, so inadequate that no reasonable person with an interest in land near the highway would know that the meeting should be attended.

4.5 Roads - Jurisdiction

4.5.1 ***Where request for approval of subdivision would have required planning board to change the status of a road from Class VI (not maintained by the town) to Class V (maintained by the town) in order to bring subdivision plan into conformity with zoning ordinance, planning board acted properly in dismissing application on the ground that it lacked authority to act on the application because it was without power to approve upgrading of a public road.***

Beck v. **Auburn**, 121 NH 996 (1981)

No summary.

5 EARTH EXCAVATION

5.1 Earth Excavation - Sand And Gravel

5.1.1 ***Both case law and statutes recognize the regulation of earth excavation as an exercise of the police and general welfare powers of towns.***

Goffstown v. Thibeault, 129 NH 454 (1987)

Defendant was charged with removing earth without a permit in violation of the zoning ordinance. Defendant claimed that the earth excavation regulations had not been enacted properly under the zoning procedures. The Supreme Court said such regulations can be enacted under any one of three authorities - zoning, excavation, or hazardous pits. The Court also ruled that the town could terminate the excavation, even though it had been operating for many years (prior to passage of RSA 155-E) because it did not comply with the zoning ordinance and, therefore, was not a grandfathered nonconforming operation.

5.1.2 ***Property owner must prove that excavation activities were being conducted prior to passage of RSA 155-E in order to continue excavation without a permit.***

Wolfeboro v. Smith, 131 NH 449 (1989)

Imposition of a cease and desist order to discontinue excavation was denied by the superior court based on the grandfather clause of RSA 155-E. Excavation is permitted under the Wolfeboro ordinance and it was agreed that excavation has occurred continuously since before enactment of RSA 155-E. The sole issue before the Court was whether the grandfather clause entitled the defendant to excavate the remaining parcel of land without first obtaining a permit.

The Court found that the legislative intent was to limit excavation without a permit when the intensity of the excavation would have a substantially different impact on the neighborhood than the existing usage. The Court reversed the lower court ruling because the defendants did not meet the burden of proof in this regard.

(There is some question of the impact of the 1989 revisions to RSA 155-E on this decision.)

5.1.3 ***A nonconforming use is permissible only where it legally exists at the date of the adoption of the zoning ordinance prohibiting the use. Continuance of an illegal use will not be permitted.***

North Hampton v. Sanderson, 131 NH 614 (1989)

No summary.

5.1.4 ***The grandfather clause of RSA 155-E does not protect an excavation operation where the landowner fails to prove that excavation activities were being conducted on the land on the date the statute was enacted. "Sporadic taking of insignificant amounts of material . . . simply does not constitute an excavation operation" which if it had been proven could have been continued without a permit.***

Town of **Barrington** v. Gadd, 132 NH 650 (1990)

No summary.

5.1.5 ***ZBA had no jurisdiction to consider request for variance where notice of the application was not given to all abutters, therefore the variance issued was without effect from the time of issuance. Plaintiffs could not claim reliance in good faith on the variance issued because they***

proceeded with their excavation project with notice of its questionable legality, and thus could not claim vested rights.

Hussey and U.S. Aggregates, Inc. v. Town of **Barrington**, 135 NH 227 (1992)

No summary.

6 RIGHT-TO-KNOW LAW

6.1 Right-To-Know Law - Interpretation

6.1.1 ***Statutory exemption from public access to executive sessions contained in New Hampshire's right-to-know law, like all other exemptions, must be construed narrowly.***

Orford Teachers Association v. Watson, 121 NH 118 (1981)

The superintendent of schools refused to allow the teachers' association to see minutes of certain executive sessions. The court stated that the public does not have an absolute right of access to workings of governmental bodies. One exception is allowed when an executive session is held solely for purposes of deliberation. Minutes must be kept only to the extent of recording any decisions made. The governmental body may vote to withhold the minutes in certain circumstances, but disclosure is required once the need for secrecy no longer exists. In this case, the minutes kept were more detailed than required by RSA 91-A and the court noted that when a group keeps such detailed records for its own purposes it should normally make the records available to the public. When there is a question as to which records may be exempt from public review, the trial judge should conduct an in camera review to determine where the statutory exemption might apply.

6.1.2 ***Copies of site plans on file need only be made if the practical realities preclude taking notes and the person offers to pay the expense.***

Gallagher v. **Windham**, 121 NH 156 (1981)

Plaintiff alleged that just viewing site plans of proposed industrial park was insufficient to comply with right-to-know law. The court disagreed, noting that the plaintiff had not offered to pay for copies and the cost to the Town was not minimal. The fact the site plans were being used one day and were not available for viewing did not deny access. The Town must assist members of the public to obtain public documents, but there is no absolute duty of the Town to provide copies.

See also Summary at 2.2.3 Subdivision and Site Plan - Jurisdiction.

6.1.3 ***Property owner was not entitled to copies of appraisal reports prepared in connection with condemnation proceedings where there***

was a potential for invasion of privacy as well as the possible release of confidential security and trade information because the benefits of non-disclosure were greater than the benefits of disclosure.

Perras v. Commissioner **NH DOT**, 127 NH 603 (1986)

Plaintiff appealed an order by the superior court denying him a copy of an appraisal report prepared by the State in connection with condemnation proceedings involving the plaintiff's property. The order also denied him access to appraisal reports of other properties, which were still involved in litigation between the State and other property owners whose land was being similarly condemned. The order allowed the plaintiff access to copies of the State's appraisal reports of properties for which the State had completed acquisition or condemnation proceedings. The Supreme Court affirmed the portion of the order denying the plaintiff access to those reports on property still in litigation and/or condemnation. The Court reversed the portion of the order allowing the plaintiff access to the appraisal reports for which acquisition or condemnation proceedings have been completed. They remanded the portion of the decision pertaining to the report on the plaintiff's property and stated that the plaintiff is free to pursue disclosure through discovery or an exchange of reports with the State.

6.1.4 ***Source notes used to prepare minutes of a meeting do not have to be preserved once the minutes have been prepared.***

Brent v. Paquette & **Alton** School District, 132 NH 415 (1989)

The issues raised in this case involve a request for copies of various contracts and other public records and whether or not the notes and tapes used to prepare minutes of a meeting must be available for public inspection. The plaintiff claimed that he had requested the copies both by letter and telephone call. After hearing the testimony, the trial court apparently determined that the plaintiff was not a credible witness and had not been denied access to the documents. The Supreme Court affirmed the ruling.

In deciding whether the tapes must be retained, the Supreme Court examined the records in the House Journal of 1983 when the Legislature added paragraph II. to RSA 91-A:4, which provides " . . . the right to inspect notes, materials, tapes or other sources used for compiling the minutes of such meetings." The House Judiciary Committee said "the material from which the minutes are prepared shall be open for inspection during the time period in which the minutes are being prepared." Based on this language, the Court determined that the defendant was not in violation of RSA 91-A by discarding his notes and tapes once the minutes had been approved.

7 MUNICIPAL LIABILITY

7.1 Municipal Liability - Estoppel

7.1.1 ***The doctrine of estoppel will not preclude a city from revoking a building permit for failure to construct within the time limit, where plaintiff could not show reliance on past practice of nonenforcement or on the authority of a municipal official who told him that no time limit existed.***

Concord v. Tompkins, 124 NH 463 (1984)

Plaintiff failed to erect a sign within the time limit set by a building permit. The permit did not state that the permit would void if construction did not commence within six months. A city official incorrectly informed an employee of the company that no time limit existed. Other signs in the city had been constructed after the applicable six-month period for each sign permit expired. The Supreme Court affirmed the superior court finding that the time limit was violated and no estoppel was proven. The Court reasoned that a municipality is subject to estoppel, but the party asserting estoppel bears the burden of proof.

There are four essential elements of estoppel: first, a representation or concealment of material facts made with knowledge of those facts; second, the party to whom the representation was made must have been ignorant of the truth of the matter; third, the representation must have been made with the intention of inducing the other party to rely upon it; and fourth, the party must have been induced to rely on the representation to his or her injury.

However, a person should inquire as to the authority of municipal official so a reliance on unauthorized conduct cannot be deemed the basis for governmental liability. Reliance is also unreasonable if the party could have discovered the truth by visiting a local government office. Generally, affirmative misconduct, more than mere negligence or capricious behavior by the government, must be established by the plaintiff. Here, the building code specified that permits are void after the time limit and it was shown that the plaintiff had not relied on the statement of the building inspector, but rather faced financial problems. Finally, there was no evidence of reliance on a past practice of constructing signs after permits had lapsed.

See 4.1.5. Jackson v. Ray, 1265 NH 759 (1985)

7.1.2 ***City may be estopped from denying a variance where it had issued a building permit for a project of which it had full details, had expected the builder to rely on the permit and the builder in fact did so, and then four months later the City decided on the basis of the same information that a variance should have been obtained before the***

permit issued. A city must be presumed to know its own zoning requirements.

Aranosian Oil Co., Inc. v. City of **Portsmouth**, 136 NH 57 (1992)

Aranosian Oil was granted a permit by the Portsmouth building department to convert its station/snack shop into a convenience store, which also sold gasoline, and spent $45,000 on construction. Four months later, the City issued a cease and desist order, suspending operations of the convenience store, claiming that it had not realized the extent to which retail sales would replace gas service bays, and that it had decided that a variance from the ZBA was necessary prior to issuance of a building permit. The ZBA denied Aranosian's application for a variance and denied its motion for rehearing. The superior court upheld the ZBA.

On appeal to the Supreme Court, Aranosian argued that detailed plans clearly showing that its service bays would be converted into retail sales area had been submitted to and approved by the building department, and that Aranosian had had no reason to think its permit might be invalid. Additionally, they argued, the City could expect that Aranosian would rely on the permit and Aranosian had in fact incurred $45,000 worth of expense, and therefore the Town should be estopped from denying the variance in the interest of fairness. The Court agreed that the doctrine of estoppel should be applied "to prevent unjust enrichment and to accord fairness to those who bargain with the agents of a municipality for the promises of the municipality."

7.1.3 ***To prove estoppel in a municipal context, plaintiff must show that the Town made a false representation or a concealment of material facts; representation must have been made with knowledge of the facts; plaintiffs must have been ignorant of the truth of the matter; the representation must have been made with intention that plaintiffs should act upon it; plaintiffs must have been induced to act upon it to their prejudice; and reliance must have been reasonable and based on authorized representations.***

Turco v. Town of **Barnstead**, 136 NH 256 (1992)

In 1987, Turcos were granted a building permit to replace their seasonal cottage with a permanent home on their land. The only access road was designated Class VI by the Town, but the State considered it Class V and provided the Town with money for its maintenance. RSA 674:41 I(a) forbids the granting of building permits unless access roads are Class V or better. After the Turcos' home was built, the Town refused to maintain the road, although they had been assured informally by a selectman that it would. Superior court held for the Town, as it was not reasonable for the Turcos to rely on assurances by one selectman made outside of his official capacity.

The Supreme Court majority reversed, saying that although the selectman's assurances were not given in an official capacity, the issuance of the building permit constituted a

representation to the Turcos that they were entitled to build a year-round home with all reasonable rights appurtenant thereto, including reasonable access. The Court found that the Turcos were ignorant of the actual status of the road, and could not have found it out by reasonably diligent inquiry, and noted that the Town had been receiving maintenance money from the state for the road although it had not maintained the road for over a decade. The Court ordered the trial court on remand to fashion an equitable (not the payment of money damages but an order requiring affirmative action on the part of the recipient) remedy that would allow reasonable access to the Turcos' property, without imposing a duty on the Town to maintain the road to the standards of Class V. In other words, the court struck a balance between the two parties' claims.

7.2 Municipal Liability - Immunity

7.2.1 ***Immunity for the negligent acts of municipal employees is abolished except for: a) the exercise of a legislative or judicial function and b) the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by a high degree of official judgment or discretion. Terms and conditions of suits are controlled by statute.***

Merrill v. **Manchester**, 114 NH 722 (1974)

The court set the above as the standard for municipal immunity. A municipality continues to be liable for negligent acts or omissions done in a proprietary function such as operation of bus service. The terms and conditions for suits including limits of recovery may be set by the legislature.

7.2.2 ***Municipal liability law is designed to limit municipal liability arising from tort suits and related personal property claims, not that arising from nuisance or trespass claims. Sovereign immunity does not protect a town from paying compensation for a taking of land.***

Cannata v. **Deerfield**, 132 NH 235 (1989)

No summary.

7.2.3 ***RSA 507-B:2, concerning municipal liability, was found to be unconstitutional because it was overbroad, violated the guarantee of the right to remedy, and it did not bear a fair and substantial relation to the legislative objection. [In response, the legislature amended the statute, and an Opinion of the Justices has declared it constitutional.]***

City of **Dover** v. Imperial Casualty and Indemnity Co., 133 NH 109 (1990)

No summary.

7.2.4 ***Despite the unconstitutionality of the immunity statute then in effect, plaintiffs lost their suit against the municipality for personal injury suffered on a publicly-owned and maintained road because they failed to prove an essential element of negligence, a breach by the municipality of the duty of care owed to travelers on the road.***

Buehler v. **Meredith**, 133 NH 128 (1990)

No summary.

7.2.5 ***Municipalities continue to enjoy limited protection from tort actions when the injury is the result of the exercise of a legislative or judicial function or a planning function involving a basic policy decision that is characterized by a high degree of official judgment or discretion.***

Beverly Gardner v. City of **Concord**, 137 NH 253 (1993)

Ms. Gardner fell on Depot Street and sued the City of Concord, claiming the city's negligence in the construction of the sidewalk in such a manner as to create a hazard caused her injuries. The superior court applied the doctrine of municipal immunity from tort actions arising as the result of discretionary functions set forth under Merrill v. City of Manchester, 114 NH 722 (1974) and dismissed her claim. The Supreme Court said that on the record before it it was not clear whether the construction of the curb in question was the result of a plan by a city planner (a discretionary act and therefore immune) or negligence in execution of such a plan by city construction workers (ministerial and therefore subject to liability). The case was remanded for further proceedings.

7.3 Municipal Liability - Quasi-Judicial Acts

7.3.1 ***A finding that a town failed to act in good faith in withholding a building permit entitled an aggrieved party to damages.***

Win-Tasch Corp. v. **Merrimack**, 120 NH 6 (1980)

The Town building inspector withheld a building permit to Win-Tasch although a grandfather clause was traditionally applied to prerecorded subdivision plans. The court found that the Town did not act in good faith. The Town acted in a quasi-judicial capacity, but asserted jurisdiction in bad faith since the grandfather clause exempted Win-Tasch Corp. The members of the ZBA were liable for damages based on economic loss from the delay.

7.4 Municipal Liability - Attorney Fees

7.4.1 ***Appeal of a denial of a building permit that was based on an ordinance found to be unconstitutional constitutes a taking and entitles the citizen to attorney fees and double costs.***

Dugas v. **Conway**, 125 NH 175 (1984)

See summary at 2.12.3 Subdivision and Site Plan Taking/Compensation.

7.4.2 ***A town's bad faith, which forces someone to go to court to "secure a clearly defined right," is an exception to the general rule that parties pay their own lawyer's fees.***

Funtown USA, Inc. v. **Conway**, 129 NH 352 (1987)

See summary of original case Funtown USA, Inc. v. Conway, 127 NH 312 (1985) at 2.12.4. Taking/Compensation.

Funtown was awarded legal fees by the original Supreme Court decision for reasons involving bad faith on behalf of the selectmen.

The Town appealed the decision on two grounds: (1) attorney's fees should not have been awarded for the inverse condemnation appeal; (2) the total amount was unreasonable. The plaintiff's additional requests were: (1) interest on the fee award and (2) attorney's fees incurred in preparing and prosecuting its motion for attorney's fees and in defending this appeal. The Supreme Court held that attorney's fees should not have been awarded for the inverse condemnation claim that attorney's fees are not to be awarded for defending the appeal of the decision to award attorney's fees, that interest on the original fees is not to be awarded, and that the amount of attorney's fees awarded for bad faith was reasonable.

7.4.3 ***Award of attorney's fees to plaintiff, based on alleged bad faith of the town in defending suit, reversed where town's legal position was not shown to be entirely without merit. (Treisman had to pay his own fees, which were approx. $35,000.)***

Treisman v. Town of **Bedford**, 135 NH 576 (1992)

No summary.

7.4.4 ***Where an individual is forced to seek judicial assistance to secure a clearly defined and established right, which should have been freely enjoyed without such intervention, an award of counsel fees on the basis of bad faith is appropriate.***

City of **Dover** v. Donald C. Kimball, 136 NH 441 (1992)

Damages against a municipality are allowed only upon a showing of bad faith. The award of fees by a trial court is discretionary, and on review the record will be examined for whether the court exercised discretion for reasons purely untenable or to an extent clearly unreasonable to the prejudice of the objecting party.

Kimball's subdivision application was rejected, and he claimed that it should have been approved despite there being a boundary dispute between the Kimballs and abutters, and that one of the planning board members had decided to reject the plan before it was formally proposed. The member had spoken to Kimball and brought discrepancies in the boundary lines on submitted plans to his attention prior to the Board's denial.

The court stated that a planning board member's discovery of obvious inconsistencies in submitted documents and subsequent statement to an applicant does not show that the applicant has been prejudged. Municipal officials must be free to advise applicants of whether their applications conform to statutory requirements and make suggestions as to how to bring the applications into compliance. The Court said that the member's comments made at hearing regarding the inconsistencies and deficiencies of records submitted by Kimball could not form the basis of bad faith, as the comments accurately reflected both the record before him and a reasonable basis upon which to reject the application, and there was no attempt by the member or the Board to purposely interfere with or delay action on the application.

The Court decided that the Board's rejection of Kimball's application was not in bad faith, but was an effort to protect all parties involved by verifying boundary lines between every lot, and the city had a reasonable claim in the law in the enforcement of its subdivision regulations. Kimball had to pay his own attorney's fees.

See also Smith v town of **Wolfeboro**, 136 NH (1992) under Takings

7.5 Municipal Liability - Insurance Coverage

7.5.1 *Where a policy is ambiguous as to whether civil rights or section 1983 actions are excluded from liability coverage, such coverage is construed in favor of the insured.*

Goshen v. Grange Mutual Insurance Co., 120 NH 915 (1980)

No summary.

7.6 Municipal Liability - Road Maintenance

7.6.1 *A negligent construction or maintenance of a gate or bar to a discontinued public way may be the basis for municipal liability.*

Bancroft v. **Canterbury**, 118 NH 453 (1978)

A motorcyclist, traveling after dark, hit a sand embankment and a bar across a bridge that was discontinued. The bar had no reflective signals or warning signs on the approach road. The Court reversed a motion to dismiss. A discontinued bridge is not subject to the filing requirements for accidents on roads. RSA 247:17, Sovereign Immunity, was repealed in Merrill v. **Manchester**, 114 NH 722, (see Section 6.2.1) and the case fell under an exception for pre-l975 accidents. The court found, furthermore, that RSA 238:6 relieves liability only for travel on closed portions of a road. The road must be discontinued in a safe and non-negligent manner.

See also Turco v. Town of **Barnstead**, 136 NH (1992) under municipal liability – estoppel

8 PREEMPTION/HOME RULE

8.1 Preemption/Public Utilities

8.1.1 *State law on power plant site approval preempts local regulations of transmission lines.*

Public Service Company v. **Hampton**, 120 NH 68 (1980)

The Town of Hampton sought to require underground transmission cables to the Seabrook nuclear power plant. The Court declared the local regulations illegal because the Public Utility Commission preempted the town. The regulation was repugnant to a decision by the PUC. The PUC was given the authority by the legislature so a town may not interfere.

8.2 Preemption/Roads

8.2.1 *The statutory scheme of placing homes for developmentally impaired persons preempts zoning.*

Region 10 Client Management, Inc. v. **Hampstead**, 120 NH 885 (1980)

No summary.

8.2.2 *A planning board is preempted by the State in control of access to State highways as condition for subdivision approval.*

JED Associates, Inc. v. **Sandown**, 121 NH 317 (1981)

JED Associates proposed to connect their otherwise approved subdivision to a state highway. The Town denied the permit. The State Commissioner of Public Works and Highways had issued a permit for the intersection pursuant to RSA 236:13. The Supreme

Court ruled that, "The legislature has given the commissioner of public works and highways broad power to regulate driveways and other means of access to State highways . . ." Hence, the State has preempted the control of access to state highways. Since the applicant had satisfied all of the state's requirements and secured a permit, the planning board may not deny permission for the intersection.

8.2.3 ***Local zoning ordinances are inapplicable to an entity specifically carrying out a state function unless the legislature has clearly manifested an intent that they apply.***

Northern NH Mental Health Housing, Inc., v. **Conway**, 121 NH 81 (1981)

The nonprofit housing corporation located a site for a group home to accommodate ten deinstitutionalized clients. The parcel was in a residential/agricultural zone limited to one-or two-family dwellings, with or without home occupations. The application for a permit to operate the facility was denied based on the zoning ordinance.

In its decision, the Court found that the corporation was carrying out an important state function and that the legislature did not expressly provide that local zoning ordinances would apply to location of community living facilities for the mentally ill. The phrase "applicable local law" in the contract referred to health and safety codes. The statutory scheme for placement of the mentally ill in community facilities is the same as for placement of developmentally impaired (see Region l0 above) and zoning ordinances do not apply.

8.3 Preemption - Hazardous Waste Sites

8.3.1 ***State hazardous waste statute is a comprehensive regulatory scheme that no local actions or ordinances may contravene.***

Stablex Corporation v. **Hooksett**, 122 NH 1091 (1982)

The Town of Hooksett passed a series of ordinances to vest local power to approve any proposed hazardous waste disposal facility in the town. Stablex sought to build such a plant. By a petition for declaratory judgment the court found the "home rule" provisions unenforceable because the state legislature had preempted the field. The planning board had no authority to approve a site plan. Preemption occurs when, as here, the state enacts a comprehensive regulatory scheme and a local action or ordinance seeks to contravene it. The local powers are expressly limited to creation of an advisory committee to submit a report to the Bureau of Hazardous Waste with recommendations regarding the proposed disposal facility. Under local zoning and site plan powers, regulations which are applied to any other industrial facility may be administered in good faith and without exclusionary effect.

8.4 Preemption - Racetrack Regulation

8.4.1 ***Municipal power is limited to the right to control the form of government as enacted in its charter. Otherwise, the legislature may grant, withhold, or withdraw local control.***

Seabrook Citizens v. Yankee Greyhound Racing, 123 NH 103 (1983)

The voters of Seabrook passed resolutions at town meetings in 1974 and 1975 not to allow Sunday dog racing under the former statute RSA 284:17-a, which allowed a local option for Sunday dog racing. In l98l such local option was repealed and the Town sought to enforce its Sunday ban. The court held that "home rule" has constitutional underpinning only as to the provisions of the town charter or the form of town charter or the form of town government. Otherwise the legislature may grant, withhold, or withdraw local control as it sees fit. The statute was not unconstitutional as a denial of equal protection. Economic regulations simply require a rational relationship between the purposes of the statute and the classifications it makes. No "vested right" of local option are possible. This is a political issue, not a judicial one.

Preemption - Dam Construction

8.4.2 ***State law prevents city zoning ordinances regulating reconstruction of a dam for purposes of generating hydroelectric power.***

Wasserman and Sandell v. **Lebanon**, 124 NH 538 (1984)

The plaintiff purchased a dam site, which had produced electricity until 1963, and adjacent property containing a mill building and proposed to reconstruct the dam to produce electricity. His agent received "conceptual approval" from the NH Water Resources Board, pursuant to RSA 482:4, of the plan to reconstruct the dam. Lebanon held that operation of the dam was a discontinued nonconforming use in that district and would require a special exception, as well as a variance because the dam and adjacent structure constituted a nonconforming lot in that district. The ZBA subsequently denied the special exception and variance. The superior court dismissed the plaintiff's appeal of the special exception and the variance was denied. The Supreme Court reversed and remanded, allowing the reconstruction as permitted by the Water Resources Board.

8.4.3 ***Safety of a proposed or existing access to a state highway may be considered as a factor for subdivision approval.***

Diversified Properties, Inc. v. **Hopkinton**, 125 NH 419 (1984)

See summary at 2.5.4 Subdivision Conditions/General.

8.5 Preemption - Mental Health Facility

8.5.1 ***Since municipal denial of hazardous waste facility site plan approval had direct exclusionary effect on the siting of the facility and thereby frustrating State regulation of the matter, the municipality's authority to deny the approval was preempted by the State.***

ACT, Inc. v. **Merrimack** and Anheuser-Busch, Inc., 126 NH 45 (1985)

Applied Chemical Technology (ACT) applied to the NH Bureau of Waste Management under RSA Chapter 147-A for a permit to construct a hazardous waste treatment facility. ACT then applied to the Merrimack Planning Board for site plan approval and was denied. The superior court held that the denial of the site plan application was improper because the state hazardous waste statute, RSA Ch. 147-A, 147-B, 147-C and 147-D, preempted the local authority to deny the permit. The court based its decision on Stablex Corp. v. Town of Hooksett. The Supreme Court affirmed.

8.5.2 ***Home rule chapter does not violate State Constitution because it does not alter the form of government of any municipality; instead it constrains the form of government from which a municipality may choose. NH Const Pt 1, Art 39. RSA 49-B.***

City of **Claremont** v. Paul Craigue, 135 NH 528 (1992)

Prohibiting voter ratification of city budget does not pervert the ends of government or manifestly endanger public liberty, so long as voters retain the right to elect their local representatives.

9 CURRENT USE/LAND TAX

9.1 Current Use/Land Tax

9.1.1 ***The proceeds from the sale of agricultural development rights are not subject to tax (RSA 36-D) unless the seller is in the business of leasing land for non-agricultural purposes.***

Jacobs v. Commissioner, **Dept. of Revenue Admin.**, 125 NH 196 (1984)

Plaintiffs conveyed agricultural land development rights to the State of New Hampshire pursuant to RSA 36-D. Plaintiffs then filed a petition with the defendant seeking a ruling that proceeds from sale of agricultural development rights are not taxable as business profits. Defendant declared that such proceeds are taxable under RSA 77-A and assessed taxes. The Supreme Court held that transfer of such rights are not assets held for use in business activities and remanded the case. On a motion for a rehearing, the Supreme Court qualified the holding to reflect the possibility that, in future cases, a seller's underlying business could make sale of such rights taxable under RSA 77-A.

9.1.2 ***A change in land use, from preservation of open space to use as a subdivision, occurred when the taxpayer began making physical improvements to the land for the purpose of subdividing it, even though the local planning board did not grant subdivision approval until later.***

Appeal of **Hollis** (NH Bd. of Tax & Land Appeals), 126 NH 230 (1985)

No summary.

9.1.3 ***Legislature has determined that the preservation of open spaces is in the public interest. Such land may be condemned for redevelopment only if the use directly benefits the public.***

Merrill v. **Manchester** and Man. Housing Authority, 127 NH 234 (1985)

See Summary at 3.1.2.

9.1.4 ***Permitting current use treatment for land used to meet density requirements would encourage, rather than, discourage intensive use.***

Patterson v. **Merrimack**, 130 NH 353 (1988)

Plaintiff consolidated three tracts to meet zoning requirements for a cluster development. One of the parcels, which was held under current use taxation, was committed to the development as open space and remained physically unaltered until a sewer line was installed across it to serve the units. The town accepted the sewer line and assessed a land use change tax for the parcel. A request for abatement was denied and the denial was upheld in superior court. In affirming the trial court, the Supreme Court stated that the entire parcel is the development site and that the land actually underwent a change in use that triggered the tax before the sewer line was installed at the point when construction began. The fact that the town delayed assessing the tax did not mean the town had waived the right to assess it.

9.1.5 ***Failure to follow silviculture practices on a parcel held under current use as forest land constitutes a land use change subject to the tax penalty.***

Foster v. **Henniker**, 132 NH 75 (1989)

The parcel of land in question had been placed under current use assessment as forest land, wild land and wetlands. At the time the current use status was requested in 1979, the selectmen, by letter, advised the applicant that forest land required a statement of silviculture and "strict adherence to the map requirement as outlined . . ." In 1985, the

selectmen assessed the land at full market rate and levied a tax penalty, contending that there had been a change in use.

The selectmen's denial of a request for abatement was upheld by the superior court. Two issues were appealed to the Supreme court: 1) Can the land use change tax be based on failure to follow sound forestry practices?; and 2) Can the wild land and wetlands retain its current use status? In upholding the lower court ruling, the Supreme Court discussed the public interest on which the current use law is based and found that an owner who receives the benefit of current use assessment on forest land must manage the land so that it can continue to produce marketable timber. The plaintiff's forestry practices were characterized in testimony as "liquidation cutting" to realize the greatest return without concern for future value. The Court also found that since the plaintiff had used the whole parcel in conducting lumber operations, the town was justified in assessing the penalty for the entire parcel.

9.2 Current Use Tax - Reimbursement Proposal

9.2.1 Opinion of the Justices, 137 NH 270 (1993)

This case discusses whether a bill proposed in the legislature amending RSA 79-A passes muster under the state constitution. The bill would amend the current use law to allow a penalty assessment on land which was changed from current use before it had been enrolled in the program for ten years or more, in order to recapture lost funds for towns negatively affected by having 50 percent or more of their land in current use. The majority agreed that the measure as proposed did not impermissibly classify taxpayers or violate equal protection, but the justices disagreed over whether the measure would be invalid as a retrospective law. [The bill did not pass.]

10 DREDGE AND FILL

10.1 Dredge And Fill - Jurisdiction

10.1.1 ***Quasi-judicial acts of state administrative board are protected by judicial immunity unless an unwarranted assumption of power had been taken by the agency.***

Sibson v. State (**Port Authority**), 111 NH 305 (1971)

The NH Port Authority heard a permit request to fill a saltmarsh. On appeal of a denial of the permit, the Court found the area in question was not a "saltmarsh" within the statutory definition. Plaintiff then filed to recover damages from the State, which claimed immunity. The Court held that the Port Authority acted in a quasi-judicial capacity and, as such, was protected by judicial immunity. The immunity does not extend to an act then under an unwarranted assumption of power in an area in which the Authority clearly could not have had jurisdiction. No one contested the authority of the board and only an erroneous decision was involved so judicial immunity protects the

members of the board. This was not an eminent domain case or an abuse of police power.

10.1.2 ***A saltwater wetland of the second type, i.e. not land submerged or flowed by mean high tide, must meet all three requirements in the statute.***

State v. McCarthy, 117 NH 799, (1977)

The defendants own land in Hampton where the State sought a petition to force the removal of fill allegedly placed in violation of RSA 483-A:1 (Supp. 1975). The Supreme Court overturned the superior court order to remove the fill because the law was misinterpreted. RSA 483-A:1 concerns jurisdiction for two kinds of land: (l) All lands submerged or flowed by mean high tide, and (2) land (a) bordering tidal water subject to tidal action (b) whose surface is at an elevation not exceeding 3½ feet above mean high tide . . . and (c) upon which grow or are capable of growing some of the vegetation specified. All three elements of the combination listed in the second type, must exist. If the required grasses do not grow or are not capable of growing, no jurisdiction may be claimed by the Water Resources Board. The existence of salt marsh peat is only evidence of the extent of jurisdiction and does not satisfy element "(c)."

10.1.3 ***Property, which is or was, part of an area contiguous to tidal water borders tidal water within the meaning of wetlands statute, and property owners' redrawing of boundaries through subdivision does not remove it from jurisdiction of the Wetlands Board.***

NH Wetlands Board v. Drop Anchor Realty Trust, 127 NH 240 (1985)

Plaintiff applied to the Board for a permit to fill a portion of its property along Ocean Boulevard in Hampton. The Board rejected the application and in response to defendant's motion, reaffirmed the rejection at a rehearing. The defendant appealed to the superior court. While awaiting the appeal proceedings, the defendant subdivided the property into three lots and the subdivision was approved by the Hampton Planning Board. On advice from their attorney, defendant began filling in the middle lot and continued filling contrary to the advice of Wetlands Board Inspector. State petitioned for injunctive relief and civil penalties. The Court denied the defendant's appeal of the Wetlands Board's action and issued a permanent injunction against the defendant, requiring removal of the fill and ceasing any additional activity. The court ordered Defendant and its agent each to pay a civil penalty of $3,500 to be used in restoration of the salt marsh. The Supreme Court affirmed.

10.2 Dredge And Fill - Private Actions

10.2.1 ***A private citizen may own the title to the bed of a navigable river subject to a public easement to use the river for navigation, floatage and fishery.***

NH Water Resources Board v. Lebanon Sand and Gravel Inc., 108 NH 254 (1967)

No summary.

10.2.2 ***The regulatory scheme created by the provisions of RSA 483-A for a Wetlands Board does not vest exclusive jurisdiction in the board over actions involving state waters, so private parties may seek injunctions in superior court based on riparian rights.***

Wisniewski v. Gemmill, 123 NH 701 (1983)

The plaintiff owned land on the oxbow of the Cockermouth River near the northern end of Newfound Lake. In l978, the defendant diverted the flow of the river without applying for a permit from the New Hampshire Water Resources Board (now "Wetlands Board"). While negotiations were pending between Defendant and the Board, plaintiff sought an injunction and damages in superior court. The court dismissed, citing the Board's exclusive jurisdiction. The Supreme Court reversed the dismissal and ruled that the legislature did not intend that the Board have exclusive jurisdiction or that the regulatory scheme abrogate the common law. Private parties have the right to enforce their riparian rights to existing river flow. Damage provisions of RSA 483-A apply when the Board's action amounts to a taking. The doctrine of exhausting administrative remedies before an appeal applies when a person was granted a permit prior to any filling or dredging of state waters.

10.2.3 ***A landowner may manage or control diffused surface water in any manner, provided it is reasonable in light of the interests affected thereby. In determining whether the measures taken by the landowner are reasonable, a court must consider the extent of the alteration of the natural or existing runoff patterns, the importance and nature of the land and its use, and the foreseeability and magnitude of any resulting damage.***

Dudley v. Beckey (**Dover**), 132 NH 568 (1989)

In this case, defendants' standing water problems were in evidence long before plaintiffs built their home and landscaped their property. The cinderblock wall built by the defendants to stem the flow of water from the plaintiffs' property to theirs was ineffective, and also caused water to back up onto plaintiffs' property. A superior court master took a view and, applying the standards above, concluded that the defendants' actions to manage the diffused surface water (erecting the wall) were not reasonable, as the wall was an eyesore as well as being ineffective. He ordered the wall removed. He also found that even if the plaintiffs had altered the topography of their land, as alleged by the defendants, such alteration was reasonable and did not change the natural flow of the diffused surface water. Superior court approved the master's ruling, and Supreme Court affirmed, finding the evidence supportive.

10.2.4 ***Existence or absence of a detectable flow cannot be relied upon as sole criteria to fix the precise boundary between two water bodies.***

Lake Sunapee Protective Association v. **NH Wetlands Board** and MJS Enterprises, 133 NH 98 (1990)

This case centers on whether a proposed dredging and excavation is located on Red Water Creek or on Lake Sunapee. The Lake Sunapee Protective Association (LSPA) maintained that a portion of MJS' construction project was on Lake Sunapee, and therefore, RSA 488-A required approval from Governor and Council. The Wetlands Board decided that the entire project was on Red Creek, and contended that it had sole jurisdiction to grant the permit under RSA 483-A. The Board approved the permit application, and LSPA appealed to superior court.

The superior court ruled the Board's use of the measurement of perceptible flow as the basis for its determination that the water body in question was Red Water Creek was reasonable and affirmed the permit. LSPA appealed to the Supreme Court, claiming that the Board had applied the incorrect standard in its factual determination. The Supreme Court agreed, citing State v. Gilmanton, 14 NH 467 (1843) and Concord Co. v. Robertson, 66 NH 1 (1889) for the proposition that the existence or absence of a discernible flow is not the sole criteria to establish the boundary of a lake, stream or creek. As the Board had only considered perceptible flow in its determination, and since perceptible flow changes with the seasons, the Court invalidated the Board's finding that the project was located only on Red Creek. "In order to avoid inconsistent and ad hoc factual determinations, specific criteria must be evaluated when fixing the boundary line."

11 VILLAGE DISTRICTS

11.1 Village Districts

11.1.1 ***A village district formed solely to purchase and operate an existing water system in a second home development may not be bound by covenants running with the landowner's deeds in setting water rates. Nonresidents have no constitutional right to vote, even in a "special purpose" district where most of the land is owned by nonresidents.***

Chasan v. **Village District of Eastman**, 128 NH 807 (1986)

Eastman is a large development, in which 90 percent of the land is owned by nonresidents. All landowners, under real estate covenants contained in their deeds, are members of, and have representation on, the Eastman Community Association. The community association voted to buy Eastman Water system from the original developer and turn it over to a village district (RSA 52), which would be created to manage it. The village district set higher-than-expected water rates and "water availability" fees. Chasan

et al brought suit complaining that these higher charges violated their covenants and contract rights under a purchase plan they had voted to adopt as community association members. They also argued that it was fundamentally unfair and unconstitutional for water assessments and taxes to be set by a small minority of landowners (the residents) without giving nonresidents voting rights. The superior court dismissed the class action suit. The Supreme Court affirmed.

12 SOLID WASTE

12.1 Solid Waste - Facilities

12.1.1 ***The Council did not abuse its discretion when it upheld an administrative decision authorizing the second stage of construction of a solid waste facility to proceed before the first stage, without requiring public comment or hearings on the permit modification, where the Council concluded that the sole effect of the modification was the use of additional landfill, and created no new environmental impact.***

In re Appeal of Working on Waste, 133 NH 312 (1990) (NH Solid Waste Management Council)

12.2 Solid Waste - Disposal

12.2.1 ***Article 28-a to the New Hampshire Constitution was designed to prohibit the State from placing additional obligations on local government without either obtaining their consent or providing the necessary funding. The prohibition of disposal of certain goods by the solid waste generator, and the prohibition of acceptance of those goods by a landfill, composting facility or incinerator for disposal, is not a state "mandate" requiring the recycling of certain goods, imposing responsibility on or necessitating expenditures by political subdivisions, and thus is not in contravention of Article 28-a.***

Opinion of the Justices, 135 NH 543 (1992)

13 TAKING/INVERSE CONDEMNATION

The issue of whether or not the application of a regulation constitutes a taking for which compensation must be paid arises in many cases. The following summaries are of major cases dealing with the subject. Additional cases are listed by title and indicate the section where the summaries can be found.

13.1 Taking - Town Resolution

13.1.1 ***A town may pass a resolution to purchase land to preserve open space, but must offer a price reflecting the land's highest and best use.***

Burrows v. **Keene**, 121 NH 590 (1981)

After subdivision plan for 124 acres of undeveloped woodland was denied, but not properly appealed, the City passed a resolution to purchase l09 acres of the land to preserve open space. The City had a comprehensive plan, which designated this area for preservation, and the conservation commission favored the purchase. The price offered was based on a city assessment of $27,000 based on noncommercial use of the land. The purchase price was $45,000 and the city's assessment for tax purposes was $4l,406. Based solely on the New Hampshire Constitution, the Court held that the owner's right to use his land in an economically viable manner is a property right that cannot be destroyed by regulation without compensation. The resolution to purchase the l09 acres was based on a reasonable exercise of police power and based on the comprehensive plan. Because subdivision of the land was a viable use of the land, the landowner must be compensated for the land by a price based on this best use of the land. The failure to compensate in an amount equal to the diminution in the value of the owner's land resulted in a taking. The plaintiff was awarded reasonable counsel fees and double costs incurred in taking the appeal to Supreme Court.

13.2 Taking - Site Plan Denial

13.2.1 Paul Dumont v. Town of **Wolfeboro**, 137 NH 1 (1993)

Erroneous planning board decision does not affect a taking of property when it is the result of misconstruction of otherwise valid restrictions. Although Board's denial of plaintiff's site plan application impeded his conversion of his property to uses that would generate higher rents, this loss was not compensable as a taking. The planning board's denial of the site plan for lack of egress had been unreasonable because it was the town's use of its own property, which effectively blocked Dumont's use of his deeded right-of-way. Under the circumstances Dumont was allowed to deviate from the deeded right-of-way to the extent reasonably necessary to secure egress for his property. It was within the trial court's discretion to grant site plan approval rather than remand to the Board as the application otherwise complied with all necessary regulations.

13.3 Taking - Conditions Of Subdivision

13.3.1 ***Conditions for subdivision approval requiring dedication of seven and a half percent of the land and safety improvements for general public traffic on a state highway were unconstitutional.***

JED Associates, Inc. v. **Atkinson**, 121 NH 581 (1981)

The developer agreed, under protest, to dedicate seven and a half percent of the land under an ordinance, which required such dedication from every subdivision. JED also protested the condition to remove a ledge, which slightly obstructed traffic on the adjacent highway. The Court held, as a matter of law, that a flat dedication requirement is out and out extortion. Municipal officials may not attempt to extort from a citizen a surrender of the right to just compensation for any part of property taken for public use as a price for permission to use the property legitimately, subject only to reasonable regulation. Improvements required to be made to a public highway must be in proportion to the increased use of the road attributable to the new subdivision. The Court expects modifications of the zoning ordinance in the future.

13.4 Taking - Sign Ordinance

13.4.1 ***Failure of a sign ordinance to grandfather prior nonconforming uses and the vested right to improve and change nonconforming use make the ordinance unconstitutional and subject to award of attorney's fees and double court costs.***

Dugas v. **Conway**, 125 NH 175 (1984)

The Town of Conway attempted to exclude signs from the definition of structures in the zoning ordinance and passed a separate sign ordinance. The sign ordinance grandfathered only existing signs in the exact present condition. The superior court held that the powers of a municipality are delegated and can only be exercised in a manner consistent with the provisions of the enabling statute. The Supreme Court, in a decision predating enactment of the Conway ordinance, had ruled that signs are structures within the meaning of RSA 31:62 and must be treated in the same manner, thus establishing a grandfather provision for nonconforming uses. RSA 31:62 creates vested rights for signs and the ordinance was found invalid. The Court ruled that both the enactment and application of the zoning regulation specifically violated the State Constitution and that attorney's fees and double court costs may be awarded to the plaintiff because he had to bear the financial burden to protect a clearly established property right from an unconstitutional taking.

13.5 ***Denial of a specific use was neither "substantial" nor especially onerous, thus no taking occurred. Therefore, plaintiff had no right to compensation. Bad faith did occur in delaying tactics so attorney's fees were awarded.***

Funtown USA, Inc. v. **Conway**, 127 NH 312 (1985)

Plaintiff had planned and begun construction of a water slide to be included in his amusement center. The zoning ordinance, at that time, did not prohibit a water slide, but a building permit was required. The selectmen denied the building permit and the zoning

board upheld the denial. Funtown submitted a revised application, which was denied because a notice of public hearing had been posted on a zoning proposal to prohibit water slides.

Subsequently, the permit was granted, and the Supreme Court faced two issues: (1) Funtown's claim for damages for loss of property value during the delay; and (2) Funtown's legal fees. The court held that no taking had occurred, but that attorney's fees were to be awarded because the town acted in bad faith.

See Funtown USA, Inc. v. Conway (1987), 6.4.2 Municipal Liability - Attorney's Fees

13.6 Taking - Zoning Amendment

13.6.1 Arbitrary or unreasonable restrictions which substantially deprive the owner of the economically viable use of his or her land in order to benefit the public constitute a "taking" within the meaning of the New Hampshire Constitution Part 1, Articles 2 and 12; mere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are incidents of ownership, and cannot be considered a "taking" in the constitutional sense. Each party in a dispute concerning whether a restriction on property is a taking bears its own attorney's fees.

Smith v. Town of **Wolfeboro**, 136 NH 337 (1992)

Developers had a subdivision on Lake Winnipesaukee in which three lots were restricted from residential use by the planning board. After obtaining permission and design approval from the NH Water Supply and Pollution Control Commission for individual septic systems for the three lots, the owners applied for removal of the restrictions. The Board denied the application as to lots 1 and 2, but decided on its own to enlarge lot 3 by adding some of lot 2 to it and approve the modified lot for residential use. The Board cited as reasons supporting its denial its concern with the possible existence of a private right-of-way over the three lots and its feeling that the planned septic systems were inadequate.

The superior court rejected both reasons, and the Town appealed. The Supreme Court accepted the superior court's finding that the original lot 3 was suitable for residential use. The Court also upheld superior court's conclusion that the Board's refusal to remove the restrictions from lot 3 was unreasonable, as the Board has no jurisdiction to determine the status of rights-of-way. The lots had been part of an approved subdivision when the amendments were passed and had been taxed separately since, so they were found to be grandfathered from setback amendments which the Board had implicitly raised as an objection by modifying lot 3.

As to the issue of septic systems, the Court noted that while a planning board is entitled to rely in part on its own judgment and experience and need not rely on another agency's determinations, there must be local standards adopted to guide applicants as to what is necessary to obtain septic system approval. As the Wolfeboro subdivision regulations

cited WSPCC approval as the only information required by an applicant regarding septic systems, and there was no evidence presented that the proposed system presented an "exceptional danger to health," the Board could not validly deny approval. Most damaging to the Town's argument was the fact that the Board had approved the modified lot 3 for residential use, without objecting to its septic system.

The trial court had found that the unreasonable denial by the Board had effected a "taking" and awarded the owners the difference in market value of lot 3 from the time of the denial to the time of the court's decision. The Supreme Court held that this remedy was improper. "An erroneous planning board decision based on sound authority must be distinguished from the application of an invalid regulation . . . . The delay inherent in the statutory process of obtaining subdivision approval, including appeals to the superior court and this Court, is one of the incidents of ownership. Any decrease in value of the subject property that occurs during the pendency of governmental decision-making must be borne by the property owner, and does not give rise to a compensable taking." Finally, the Court ruled that an erroneous decision by a planning board does not constitute malice and bad faith such that the owners should be awarded attorney's fees.

13.6.2 ***Reasonable zoning requirements that limit economic uses of property, but do not substantially destroy the value of an individual piece of property, do not affect takings requiring compensation under the constitution.***

Buskey v. Town of **Hanover**, 133 NH 318 (1990)

Landowner's multi-residential property was situated in a residentially zoned district bordered on two sides by a commercially zoned district. The ZBA denied their request for a variance to remove their building and build a parking lot. The Buskeys claimed in superior court that the Hanover ordinance was unconstitutional as applied to their property because there were other nonresidential uses allowed in their district by special exception and they could make a lot more money from their property if they used it as a parking lot. The superior court agreed, saying that the ordinance was unreasonable and arbitrary as applied to the Buskeys' property, and that the ordinance should have been modified to reflect the enormous changes that had taken place in the area since its enactment.

The Supreme Court reversed, saying that just because the plaintiffs could make more money from a commercial use did not make the ordinance prohibiting that use unreasonable. The Court noted that the Buskeys' district served as a buffer zone between commercial and residential property, and the zoning ordinance was not unnecessary to accomplish the legitimate public purpose of maintaining the residential character of the neighborhood or to control congestion. Emphasis was placed on balancing the landowners' interests with the public gain. The Court decided that as a legitimate public purpose was being served and the value of the Buskey's property was not substantially destroyed, it would defer to the legislative discretion in determining the boundary between residential and commercial property.

13.7 Takings - Denial Of Variance

13.7.1 ***Lots of record are exempt from yard and lot size requirements, but not from wetlands or other sections of the ordinance. Denial of a variance due to valid wetlands regulation is not a taking. Any challenge to the town's definition of wetlands should be made through an amendment to the ordinance and not through the courts.***

Rowe v. **North Hampton**, 131 NH 424 (1989)

Plaintiff was denied a variance from the town's wetlands ordinance to permit construction of a house and septic system. Plaintiff claimed the lot was grandfathered and that a taking would occur if the permit was not granted. The lot contains the required two acres for the district, but could not meet the additional requirements of the wetlands overlay: septic systems may not be closer than 75 feet from any wetland, and the wetland portion may not be more than 50 percent of the required lot area. The Court determined that no unnecessary hardship existed and that no taking occurred. There is strong public policy to protect wetlands, the ordinance lists other permitted uses (even though they may not be economically viable), the lot is not unique from other lots in the area, lots of record are not exempt from wetlands requirements, and the expectation of greater value if the variance were granted does not justify granting it.

13.8 Takings - Discontinuance Of Sewer System

13.8.1 ***A sewer system built by a municipality is the property of the municipality. The granting of the right to connect to the system gives no property rights to users such that the decision by the municipality to discontinue the system would constitute inverse condemnation requiring compensation to users. The Town of Monroe's decision to discontinue the system without building a wastewater treatment plant, and to use money appropriated for the "designing and construction of sewage disposal system for the Monroe sewer system" to build individual septic systems for town-owned buildings was a valid exercise of authority.***

Adams v. Bradshaw (**Monroe**), 135 NH 7 (1991)

No summary.

13.9 Takings - Wetlands Regulations

13.9.1 ***Wetlands protection act protects the public health and welfare so that even restriction of substantial property rights are not a "taking."***

Sibson v. **State**, 115 NH 124 (1975)

Plaintiff appealed a decision of the "special board," (now Wetlands Board) denying a permit to fill four acres of salt marsh in Rye. Although similar land was not deemed a "salt marsh" under a previous statute, the land clearly was one under RSA 483-A:1-a (Supp. 1973). Sibson claimed the statute resulted in a "taking." The Court could have found that a previous filled lot on the same parcel already returned the initial investment plus a profit so only a speculative profit was denied. Instead, the court squarely faced the issue of whether salt marshes not in contact with tidal waters and freshwater marshes may be regulated. The Court held that this was not eminent domain where private property is taken for public use but rather that the regulations are part of the police welfare and morals of the public. The test of the validity of the state action is determined by balancing the importance of the public to be promoted against the seriousness of the restriction of a private right. The State action is sustained in these cases unless the public interest is so clearly of minor importance as to make the restrictions of individual rights unreasonable.

The Court found that the importance of wetlands to the public health and welfare would clearly sustain the denial of a permit to fill marshland even where substantial property rights are inherent in a current use or activity. Under the facts, Sibson may not claim a substantial character of current use. No current use was denied, but rather a major change in the marsh was prevented. Only a speculation profit was denied as opposed to causing a change of the essential natural character of the land to an unsuited use, which would injure the rights of others. In this case the denial of the permit to fill the salt marsh was a valid exercise of the police power.

13.9.2 ***Where the public policy advanced by the regulation is particularly important and the landowner's action would substantially change the national character of land to use it for a purpose for which it was naturally unsuited and which injures the rights of others, the general principles of inverse condemnation are inapplicable and a regulation which restricts use of property will not cross the threshold of a taking without a showing that the owner's substantial, justified expectations concerning the property are thwarted and that the burden of the State's action being cast upon that property owner is unreasonable.***

Claridge v. **NH Wetlands Board, Rye**, 125 NH 745 (1984)

The Claridges applied for a fill permit from the Wetlands Board for their property bordering a tidal creek in Rye. After a hearing, the application was denied. The Claridges appealed to the superior court, who upheld the board's decision. The Supreme Court affirmed.

13.10 Inverse Condemnation - Waste Water Systems

13.10.1 ***A sewer system built by a municipality is the property of the municipality. The granting of the right to connect to the system gives no property rights to users such that the decision by the municipality to discontinue the system would constitute inverse condemnation requiring compensation to users. The Town of Monroe's decision to discontinue the system without building a wastewater treatment plant, and to use money appropriated for the "designing and construction of sewage disposal system for the Monroe sewer system" to build individual septic systems for town-owned buildings was a valid exercise of authority.***

Adams v. Bradshaw (**Monroe**), 135 NH 7 (1991)

No summary.

Additional Cases Related to the Taking Issue:

Steel Hill v. **Sanbornton**, US Circuit Court (1972)
Summary at 1.12.1 Slow Growth

Village House v. **Loudon**, 114 NH 76 (1974)
Summary at 3.5.10 Mobile Homes

Robbins Auto Parts v. **Laconia**, 117 NH 235 (1977)
Summary at 2.6.2 Off-Site Improvements

Patenaude v. **Meredith**, 118 NH 616 (1978)
Summary at 2.8.2 Compliance with Zoning

Loundsbury v. **Keene**, 122 NH 1006 (1982)
Summary at 3.4.3 Police Power-Signs

Biggs v. **Sandwich**, 124 NH 421 (1984)
Summary at 3.2.4 Police Power Wetlands Protection

15 WETLANDS BOARD - GENERAL

15.1 ***Where a full adjudicatory hearing has been conducted with the procedural safeguards of the Administrative Procedures Act, superior court has no jurisdiction under RSA 677:4 to hear appeals directly or collaterally attacking the imposition of an administrative fine under RSA 483-A:5-a. Supreme Court's jurisdiction over appeals of administrative fines is exclusive per RSA 541:6.***

Allen v. State Wetlands Board, 133 NH 379 (1990)

Landowners received a permit from the Wetlands Board to build a retaining wall, with specific conditions regarding height, length and distance from the high water mark. The wall was not built to permit specifications, and the Wetlands Board levied a punitive fine as a result. The landowners were denied a rehearing by the Board, and filed a petition with the superior court seeking to annul the fine. The Board counterclaimed to have the court order removal of the wall. The superior court found that the Board's findings were unreasonable, reversed the imposition of the fine and declined to order removal of the wall.

The Supreme Court reversed, saying that the superior court lacked jurisdiction to hear the appeal of the administrative fine, as the Supreme Court's jurisdiction under the Administrative Procedures Act over such appeals is exclusive. The Court also noted that the statute governing wetlands permits mandates removal of any structure found to be in violation of permit conditions, and that therefore the superior court should have ordered removal of the wall.

NOTE: RSA 483:A has been recodified (Jan 1990) to RSA 482:A.

16 LEGISLATIVE AUTHORITY

16.1 Legislative Authority - Creation Of Municipalities

16.1.1 ***The proposed legislative formation of a new town of Weir's Beach does not alter the form of government of the City of Laconia so as to be violative of the New Hampshire Constitution, nor does it trigger the requirement of a town referendum. The legislature has authority to create new municipalities or modify the boundaries of existing ones in the furtherance of the public interest, and to determine the applicability of the referendum requirement.***

Opinion of the Justices, 134 NH 711 (1991)

No summary.

17 JUNKYARDS

17.1 Junkyards - Fines For Violation

17.1.1 ***As statute provided that each day a violation of an ordinance continued was a separate violation, and local law provided that the fine for a single violation could not exceed $100, a fine of $6,060 did not entitle operators of unlicensed junkyard to constitutional right to jury trial where the fine was an aggregate of fines for separate***

violations and not a single violation for which the fine may not exceed $1500 without jury trial.

Town of **Henniker** v. Lawrence Homo, 136 NH 88 (1992)

Homo and spouse were fined $6060 by superior court for maintaining a junkyard on their property without a license, in violation of RSA 236:114 and Henniker zoning ordinance. The amount of the fine was based on an assessment of $10/day for the 606 days the violation was found to have continued. The Homos appealed, arguing that they were unfairly deprived of their right to a jury trial because the amount of the fine exceeded that which entitled them to a jury trial under the constitution. The Supreme Court stated that civil fines exceeding $500 [now $1500] may not be levied against individuals for violations of a local ordinance without granting such individuals a jury trial on appeal. The majority held that as RSA 236:127 provided that each day constituted a separate violation and the Henniker ordinance provided that the fine for a single violation could not exceed $100, the total fine was merely an aggregate of fines for 606 separate violations and not a single one, the Homos were not entitled to a jury trial.

17.2 Junkyards - Definition

17.2.1 ***The exemption in the junkyard laws for a registered motor vehicle dealer applies only if the dealer removes junk cars from the business site within 160 days of their arrival. If they remain longer, the site will be deemed a junkyard and be required to be licensed as such. This is true whether the cars are located along a federally-funded highway or a municipal highway. (Court interprets RSA 236:91 and 236:107.)***

State of New Hampshire v. Autoware (**Canaan**), 133 NH 465 (1990)

No summary.

17.2.2 ***A junkyard may properly be excluded from a residential district when an industrial district did exist elsewhere in the town.***

Hudson V. Paradise, 101 NH 389 (1958)

No summary.